United States Court of Appeals

for the Second Circuit

APPENDIX

Nos. 74-1584, 74-1636

In the

United States Court of Appeals

For the Second Circuit

SCIENTIFIC HOLDING COMPANY, LTD, AN ILLINOIS CORPORATION,

Plaintiff-Appellant,

vs.

PLESSEY INCORPORATED, A DELAWARE CORPORATION,

Defendant-Appellee.

APPENDIX.
Volume II (Pages 417-850)

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T3 Q Now, under the second draft of the agreement, using Mr.Sinsheimer's language, when would you have had to make $15,000 profit if you were going to remain in control of the business?

A In the third calendar month of the measuring year we would have to earn at least $15,000 profit.

THE COURT: What would the third calendar month be?

THE WITNESS: June.

THE COURT: In other words, you would have to make a profit of 15,000 in June?

THE WITNESS: In the month of June; that is correct.

THE COURT: All right.

Q Under the language in the second draft did you have any right to average profits?

A There was no reference to any averaging. You have to make $15,000 in the third month and thereafter per month.

Q Under the second draft was it your understanding that you had any right to take profits from the first two months and add them to June to reach a profit of $15,000?

A There was no reference to the first two months other than they would not be counted. You would have to

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make $15,000 in the third month and each month thereafter.

THE COURT: You understood that neither the profits nor the lossses in the first two months would be counted?

THE WITNESS: That is right, sir.

THE COURT: You would just go to June, which was the third month, and if you make a profit of 15,000, as you understood the contract, you would stay in management; if you didn't, Plessey could take over?

THE WITNESS: Would have the option to do so; yes,sir.

THE COURT: Okay.

Q That would be true even if you had made very large profits in April and May?

THE COURT: We have covered all that. It made no difference whether they made large profits or large losses.

Q Looking at the last sentence of paragraph 5-D in the second draft, Mr. Kovar?

A Yes, sir.

Q What did you understand Plessey's obligation to be under that paragraph in the event that it assumed management control?

A Could you repeat that question, please?

op3 Kovar-cross

(Question read.)

A That if it assumed management control that it was its obligation to offer it to reach the maximum profit available during the measuring year.

Q In Defendant's Exhibit P, Julius Lewis's language, his last sentence:

"Plessey will continue the business in good faith and will maximize the profits for the measuring year."

Now, in the second draft of the agreement it says "good faith" but there is no language concerning maximizing profits, is there?

A No,there is no specific language saying "maximizing profits"; that is correct.

Q Now, between the time you picked up the second draft of the agreement from Mr. Dubin and the signing of the agreement on February 4, was there a meeting of the board of directors of ISL?

A There was.

Q At that board of directors meeting was there a discussion of the management control provision?

A Yes, sir.

Q Could you tell us what the substance of that discussion was?

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op4 Kovar-cross

A I advised the board that the draft, as presented to me by Mr. Dubin, would require us to generate at least $15,000 profit in the month of June and each month thereafter in order for us to retain active management.

I also advised the board that Mr. Lewis had told me that he thought he had agreement from Mr. Dubin and/or Mr. Albert to an averaging provision, as he had explained to me over the phone on the day before when we reviewed this contract.

Q Was Mr. Lewis in attendance at the board of directors meeting?

A No, sir.

Q Where was Mr. Lewis?

A He was in Pasadena until 12.30 New York time and then he was leaving for San Francisco. This board meeting took place, I believe, starting in the morning and ending in the afternoon.

Q Where was the board meeting?

A In New York City.

Q Did Mr. Shapiro attend the board meeting?

A No.

Q To your knowledge, was Mr. Shapiro involved in the discussions with Mr. Dubin concerning the management control provision?

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A I don't recall that he was. I think it was just Mr. Lewis, but I don't recall.

Q What did you report to the board of directors as being Julius Lewis's understanding of what Plessey would agree to?

A That they would agree to the averaging provision so that commencing with the third month the obligation would be that we would average $15,000 per month thereafter so long as we didn't lose money in any three consecutive month period.

Q Did the directors inquireas to what months those would be?

A I am sure there was a discussion on it. I don't know that they inquired. At that point we were talking about what the measuring year would be, so I am sure it would have come up, yes.

Q Did any of the directors ask you how long you would have to reach the $15,000 profit level under this oral agreement with Plessey?

A I am sure that they did.

Q Do you recall what your response was?

A Well, it would have been that we would have June and July to reach an average.

Q Did you explain to the directors that if you had

op6 Kovar-cross

less than $15,000 in June, that would be all right if you made enough in July so that the two months averaged $15,000?

A It follows. That is what an average is, yes.

Q Do you recall saying that?

A I don't recall the exact words, Mr. Maloney. I would think that that would have been discussed, but I, frankly, do not recall the exact words.

Q Now, under this agreement with Plessey to change the language in the second draft, was there any agreement concerning the first two months of the measuring year; would that have changed?

A Not at that point. If I understand your question correctly, we were saying what would happen commencing the third month. Everybody knew the firsttwo months would be losses because we would have to get the money, we would have to go out and buy materials and then start to fill up the production line that had been emptied out because of the lack of money and that is why Julius said commencing the third month and I assume that is why the second draft said commencing the third month, because everyone knew the first two would be losses.

Q On page 6 of Defendant's Exhibit K, I see the word "CPA arbitration." Was that an additional provision that was discussed at the board meeting?

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A Yes, sir.

Q What was the arbitration provision to cover?

A Well, as I recall, the provision indicated that the ISL management should act consistently with or comply with policy directives issued by Plessey's board. However, if it was going to cost us on the earn-out formula that we would have a right to challenge it and to have that amount deducted.

Our board members, at least one of them, suggested that there should be a provision in the contract indicating how that kind of question, if it came up,would be resolved and my notes indicated that the discussion was that the language called for an arbitration by a Certified Public Accountant, someone who was recognized in the field.

Q So, if Plessey during the measuring year asked you to do something, was it your understanding that you would be obligated to do it?

A To the extent that it was a policy directive of Plessey, it would be my obligation, I think, to first question -- to raise a question as to whether it would affect the earn-out and if it could not be resolved in terms of that, before doing anything that issue would have to be resolved. So, I guess to answer your question, yes, ultimately once the issue was resolved as to what was

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the financial effect of such action.

Q That would be resolved by the arbitration provision?

A That was the suggestion that we made, yes.

Q Was that suggestion incorporated in the final agreement, Plaintiff's Exhibit 3?

A There was language to that effect; yes, sir.

THE COURT: All right, we will take our morning recess.

(Recess.)

(In open court; jury present.)

THE COURT: You may proceed, Mr. Maloney.

BY MR. MALONEY:

Q Mr. Kovar, just one more question on paragraph 5-D. The first sentence says, "The present management of ISL shall operate the business during the measuring year and shall have the maximum freedom to operate the business in a manner which will produce in the judgment of such management the maximum profit available, provided, however, that any policy directive issued by the directors of Plessey shall be complied with."

Now, wasn't it your understanding that if Plessey directed you to do something, you had to do it?

A No, it was my understanding that if I thought

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or our management thought that that was going to adversely affect our earnings potential, that prior to the commencement of any such action we would challenge it and attempt to resolve the issue as to how it would affect earnings and to what extent it would affect earnings. I thought it clearly said that. That should Plessey propose any course of action which would be detrimental, that prior to the commencement of such course that the question of how much the effect would be would be determined.

Now, after that was determined, yes, then I would comply with it.

Q That would be the arbitration provision, namely, arbitrating what the cost of the proposed directive from Plessey would be; is that correct?

A In the event we couldn't agree, there was then the provision for arbitration, but, of course, initially it would be between the principals as to what the effect would be and, then, if we couldn't agree, it would be submitted to arbitration; yes, sir.

Q Now, following the board meeting, who undertook to have the language of paragraph 5-D changed so that it reflected the provision discussed at the board meeting?

A I did.

Q With whom did you discuss it?

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A Mr. Dubin.

Q Did you give Mr. Dubin the language which should be incorporated in the final copy of the agreement, paragraph 5-D?

A I suggested some language. I didn't give him any.

Q At the board meeting did anyone attempt to write down the specific provision which you had asked Mr. Dubin to include in the agreement?

A Only with respect to some language concerning arbitration.

Q But with respect to the three-month averaging, did anyone at the board of directors' meeting reduce that provision to writing?

A No, sir. As I mentioned to you, Mr. Dubin had indicated to me -- excuse me, Mr. Lewis had indicated to me and I told the board --

MR. MALONEY: Your Honor, I think we could move along more quickly if Mr. Kovar would just answer yes or no to some of these questions.

THE COURT: All right.

MR. McCONNELL: I think he has been responsive.

THE COURT: I think he has been pretty responsive. It is pretty complicated.

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What is the question again?

(Question read.)

THE COURT: You can answer that yes or no.

A The answer is no.

Q Did you give Mr. Dubin any written language covering the three-month averaging provision?

A No.

Q Did the language that ended up in Plaintiff's Exhibit 3, paragraph 5-D, accurately reflect the agreement of the parties?

A No.

Q That language was corrected by Plaintiff's Exhibit 4, Mr. Lewis's letter to Mr. Dubin, dated February 18, 1970?

A Yes, sir.

Q Between the signing of the contract on February 4, 1970, and the closingon March 2, 1970, do you recall whether any Plessey employees visited Barbados?

A Yes.

Q Which employees were they?

A Mr. Clarke, Mr. Crocker, Mr. PeterHewitt, and I believe Mr. Sweeney and I am not sure about Mr. Albert.

Q You don't recall whether Mr. Albert came to Barbados between February 4 and March 2, 1970?

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A No, I don't.

Q Who was in charge of the manufacturing operation of the plant in Barbados in February, 1970?

A The manufacturing manager was Mr. John Norstedt.

Q Did Mr. Norstedt continue with ISL after the closing?

A No, he did not.

Q Was he terminated?

A Yes, he was terminated, but it was voluntary on his part.

Q He didn't wish to continue working for ISL?

A He didn't wish to continue working for Plessey.

Q For Plessey?

A Correct.

Q When was his resignation or termination effective?

A The end of February, February 28, I believe.

Q When had Mr. Norstedt told you that he would not continue on after the closing?

A It was in the second week of February.

Q Did you convey that to someone at Plessey?

A Yes.

Q Were you making efforts to replace Mr. Norstedt?

A No, I was not.

Q Would you describe Mr. Norstedt's responsibilities

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for the jury?

A Mr. Norstedt was in charge of the manufacturing operations which included inventory and cost control and maintenance work. He was our manufacturing manager.

Q Other than yourself, was there any employee of ISL who was senior to Mr. Norstedt?

A Probably Mr. Hourihan. I am trying to picture the organizational chart. In my absence I normally put Mr. Hourihan in charge.

Q Leaving Mr. Hourihan and considering the manufacturing employees and the engineers, was Mr. Norstedt in charge of all of those employees?

A He would not have been in charge of the engineers. He would have been in charge of all of the manufacturing operations and employees and would have reported directly to me.

Q Who was incharge of the engineers?

A Mr. Keppel.

Q Who was Mr. Hewitt?

A Mr. Peter Hewitt was a manufacturing man from Plessey who was then employed at their Lisbon facility.

Q Do you know what position he held at Plessey's Lisbon facility?

A It was my understanding that he was their produc-

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facturing manager at the Lisbon facility.

Q Was he the senior man in charge of that operation?

A I think there was another man over him, but he would have been the No. 2 man.

Q Did Hewitt come to Barbados with Clarke and Crocker?

A No, he came down several days later.

Q While Mr. Clarke and Mr. Crocker were in Barbados, did you discuss with them the fact that Mr. Norstedt was leaving?

A Yes, I did.

Q Did you discuss the need for replacing him?

A Yes, I did.

Q Did Mr. Clarke and Mr. Crocker make any offer to assist you in that respect?

A They did.

Q What was their offer?

A To transfer Mr. Hewitt over to Barbados.

Q Take the No. 2 man from their plant in Lisbon and allow him to replace Mr. Norstedt at your plant?

A That is correct.

Q By that time did you have any other candidates for the job who could have replaced Mr. Norstedt?

A No, sir.

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Q Did Mr. Hewitt actually come and assume Mr. Norstedt's position when Mr. Norstedt left?

A Yes, he did.

Q On Friday, Mr. Kovar, I think we were discussing this question of whether or not goods which were returned and goods which were repaired and shipped back to the customers should be included in the monthly profit and loss statements; is that correct?

A Yes, sir.

Q Mr. Albert suggested to Mr.Hourihan that that should be done?

A That is correct. He said that's the way Plessey did it and suggested that we should do the same.

Q Was it part of your agreement with Plessey that thos calculations would be made in calculating the monthly profit and loss during the measuring year?

A It was not part of the understanding as such, no.

Q Would it be possible to determine whether or not ISL was averaging $15,000 a monthprofit without making a decision on whether or not to include those returns in the calculation?

A Well, I think, Mr. Maloney, the contract specifies that the profit-loss computation would follow ISL's

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normal practice so that this was not our normal practice, so I guess my conclusion would be that this would be excluded from the earn-out formula, but I don't know that anyone had a specific conversation with respect to the point that you have raised.

Q Then, it is your position that in calculating the amount of profit or loss for any given month under ISL's past practice, those returns should not have affected in any way the profit or loss for a particular month?

A I haven't taken a position on that point today. If you are asking me what my position is now --

Q I would like your position in 1970.

A I didn't have a position on that matter in 1970.

Q There was never any discussion with Mr. Albert or Mr. Hourihan about whether or not these returns should affect the calculation of profit and loss during the measuring year?

A No, sir; I don't believe there was.

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(Defendant's Exhibit R marked for identification.)

(Defendant's Exhibit S marked for identification.)

Q I show you Defendant's Exhibit S and ask you if you can identify that document.

A This would be a copy of the statement of profit and loss for January, 1970, as prepared by Mr. Hourihan, with backup sheets.

MR. MALONEY: Your Honor, I offer Defendant's Exhibit S in evidence.

THE COURT: Any objection?

MR. McCONNELL: No objection.

THE COURT: It may be received.

(Defendant's Exhibit S received in evidence.)

Q Mr. Kovar, I show you Defendant's Exhibit R for identification and I ask you if you can identify that document.

A This is a copy of the balance sheet of ISL as of March 1, 1970, with also a statement of profit and loss for the month of February and year to date, 1970, with backup data.

MR. MALONEY: Your Honor, I offer it in evidence.

THE COURT: Any objection?

MR. McCONNELL: No objection.

(Defendant's Exhibit R received in evidence.)

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Q Do you have any recollection of whether either Defendant's Exhibit R or Defendant's Exhibit S were delivered to Plessey at the closing on March 2th in Barbados?

A I would doubt seriously that they were delivered at the closing. The January statement, the one identified as S, would have been given to them earlier, and the February statement probably wasn't available on March 2nd.

Q Did you personally give the January statement, Defendant's Exhibit S --

A No, sir.

Q -- to anyone from Plessey prior to March 2nd?

A I personally did not, to my recollection.

Q Could you tell the jury what the net operating loss for the month of January was as shown on Defendant's Exhibit S?

A It shows $1608.12.

Q In arriving at that net operating loss, did Mr. Hourihan include returned goods which were reshipped to customers in January?

A He did.

Q What effect would that have on your operating profit and loss?

A Well, it would depend upon whether returns exceeded the returns from customers -- the returns from

customers exceeded the products shipped back to the customer. In this case, the returns reshipped exceeded the returns received..So it would have increased the total sales for the month.

Q Under your old practice, could you tell the jury what sales for January would have been reported on your January monthly statement?

A 75,000.

Q And by including returns back from customers and goods prepared and shipped back by the customer, how did that affect total sales for January?

A Increased it to 114,000.

Q Which is approximately an increase of $40,000?

A 41,000, correct.

Q Mr. Kovar,is the cost of producing the product for the first time greater or lesser than just preparing a product which has been returned by the customer as defective?

THE COURT: Well, you are generalizing in that?

MR. MALONEY: Yes.

THE COURT: Can you tell, as a general proposition, or does it vary?

THE WITNESS: Well, it would have to vary. I would think the repair generally would have less time in

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it than the production of the original product.

Q How about materials, Mr. Kovar?

A Unless you were scrapping the entire thing, you would only be replacing whatever materials were defective or had been damaged, so the material cost upon repair should be less than the original material cost of the product.

Q It should be substantially less, shouldn't it?

A As I say, it would vary. It should be less.

Q Was it your practice to normally scrap the entire product that was returned by the customer for repair?

A It was not.

Q Going back to Friday afternoon, when you told us that all of a sudden in November and December you received $150,000 of returned products --

A I think I said I thought we had that in house and I don't know which months that they were returned. I don't know whether it was all December or November and December or some prior months. I couldn't say.

Q This may have been cumulative, it may not have all come back in November and December?

A I couldn't tell from the records you showed me.

Q Do you have any recollection of how much of that product would have been scrapped entirely?

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A No, sir.

Q Going back to the January statement, if Mr. Hourihan had followed ISL's normal practice and not included returns or repairs reshipped to the customer, would the loss have been greater or lesser than $1600?

A It should have been greater.

Q Was Defendant's Exhibit S, the January statement, prepared for some specific purpose in connection with the agreement with Plessey?

A No. It was the type of thing which we had attempted to do at all times. It wasn't prepared just for the Plessey agreement, it was prepared as part of the normal reporting procedure.

Q Going back to the contract, paragraph 10E, that we spoke about operating losses of $20,000 per month--

A Yes.

Q -- would this statement have something to do with that paragraph, Mr. Kovar?

A It certainly would have something to do with it.

Q Why was this statement given to Plessey?

A Because we were giving Plessey all financial records that we had available.

Q And Plessey was to rely on this statement to decide whether or not you had lost more or less than

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$20,000 in the month of January, isn't that correct?

A That in my opinion, it is not correct.

Q How was Plessey going to find out how much money you lost in January unless it was relying on this Defendant's Exhibit S?

A By Plessey's own personal inspection of the records.

Q Do you mean, Mr. Kovar, that you were not going to have your own accountant determine what the profit and loss was to see whether or not you were in compliance with this agreement?

THE COURT: Well, wait, I think we are moving awful fast now.

MR. MALONEY: Well, I will withdraw the question, your Honor.

Q To your knowledge, did Mr. Albert ever prepare a statement showing the profit and loss for ISL for January, 1970?

A I am afraid I don't know what Mr. Albert prepared.

Q Did you ever see any statement for the month of January, 1970, other than Defendant's Exhibit S?

A I am not sure whether you would call it a statement.

Q Well, did you ever see any other document that

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showed how much money ISL made or lost in the month of January, 1970?

A Yes, sir. I saw a document in which Mr. Sweeney and Mr. Crocker and possibly others stated that it was obvious would not meet projections for January and February and that its losses would be greater.

Q Could you tell me what document that is? Does Mr. McConnell have it?

A Yes, and so do you.

MR. MALONEY: I would ask Mr. McConnel to produce it.

MR. McCONNELL: It is your document. I would be happy to offer it in evidence at this time as Plaintiff's Exhibit 111.

MR. MALONEY: We have no objection, your Honor.

(Plaintiff's Exhibit 111 received in evidence.)

Q Could you tell me the portion of Plaintiff's Exhibit 111 to which you are referring, Mr. Kovar?

A Yes, sir.

THE COURT: Before you do that, do I understand this Exhibit 111 was prepared by defendant?

MR. McCONNELL: Yes, your Honor. It is a report on the proposed acquisition of ISL prepared by Plessey.

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Q Could you tell me what page of Plaintiff's Exhibit 111 you are referring to?

A Unfortunately, the copy that I have doesn't designate the page numbers as such, but you will note that on the seventh page in there is a reference to January results showing $111,000 sales, with a forecast loss of $9,500, and then at the bottom of the page, comments on the ISL budget for 1970: "The original budgeted figures for January and February will not be met due to lack of finance resulting in shortage of materials. Providing additional funds are made available, the situation should rapidly improve." That is the end of the quote on that page.

Q I will let you refer to any other page you want, but I would like to stay with this one for the moment. As far as the January result, the document you just read forecasts a loss of 9,500 United States dollars on sales of $111,000?

A Yes, sir.

Q But on Defendant's Exhibit S, prepared by Mr. Hourihan, he has a loss of only $1608 on sales of $114,000. Could you explain -- well, withdrawn. Is that correct?

A Yes, sir.

Q Would you like to refer to Defendant's Exhibit N,

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Mr. Kovar?

A I would like to look at a couple of these, if I may.

(Pause)

A Now, what was your question?

Q Referring to Plaintiff's Exhibit 111, when did you see that document for the first time?

A This weekend.

Q Do you know who prepared that document?

A It shows that it is prepared --

Q By Mr. Clark and Mr. Crocker? Does that refresh your recollection?

THE COURT: He says he only saw it this weekend.

A I thought there was a specific point in here some place that I saw. Inside there is a memo dated February 18th, signed, apparently, or noted that Mr. Clark and Mr. Crocker are the authors.

Q Mr. Clark and Mr. Crocker had visited Barbados on February 18th, or thereabouts?

A I think they were there the 16th, 17th and 18th.

Q Do you have any knowledge of whether or not this is a report which they prepared based on that trip to Barbados?

A It so indicates that it is a report on the

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proposed acquisition and refers to meetings that they held at that time, yes, sir.

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Q Do you know whether or not when Mr. Clark and Mr. Crocker was in Barbados in the middle of February Mr. Hourihan gave them a copy of the January statement, Defendant's Exhibit S?

A I would assume that he gave them all the information that is there. Whether it was typed in this form on that date, I really couldn't say.

Q If I understood your earlier testimony, you said that Defendant's Exhibit S would have been prepared long before the closing on March 2nd, is that correct?

A I don't believe I testified it would have been long before. It would have been some time in February.

Q If it had been prepared by February 18, 1970, would Mr. Hourihan have given a copy of it to Mr. Clark and Mr. Crocker?

A Yes, sir.

Q If Mr. Clark and Mr. Crocker had been given a copy of Defendant's Exhibit S, why would they be forecasting a loss of $9,500 for the month of January when this statement shows a loss of only $1,600?

THE COURT: I guess you would have to ask them on that. I don't know how he can answer that. I suppose

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people treat figures differently, but I don't know how this witness can explain what Mr. Clark and Mr. Crocker were thinking.

Q Did you have any discussion with Mr. Clark and Mr. Crocker on the results for the month of January?

A I am sure that we did.

Q Do you recall discussing a figure of $9,500 as a forecasted loss with them?

A I do not recall the specific figure.

Q Do you recall whether by February 16th you knew that the loss, according to Mr. Hourihan's figures, was $1,600?

A I don't. I can't say that I knew that exactly. I am not sure exactly when that was completed.

Q Turning to Defendant's Exhibit R, Mr. Kovar, I believe it is on the third page of the document, where you have a sheet entitled "International Scientific, Limited. Statement of profit and loss February, 1970," and then we have a long column of items, and next to that, two long columns of numbers.

What are the numbers in the first column, if you know?

A They represent the figures for the month of February.

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Q And what are the figures in the column "year to date"?

A That would have represented the figures for January and February combined.

Q And this statement was prepared by Mr. Hourihan?

A Yes, this is his handwriting.

Q What did Mr. Hourihan show as the net operating loss for the months of January and February?

A $74,045.81.

Q Again, in preparing this statement, did Mr. Hourihan take count of goods which had been returned by the customer and goods which you had prepared and shipped back to the customer?

A He did.

Q Was the difference in your favor?

A It would have been, yes, $14,000, $15,000.

Q What were the amount of returns for January and February combined?

A $34,901.

Q And what was the amount of goods which you had repaired and shipped back to the customers?

A $59,107.

Q What did you say the difference in your favor was?

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A I said 14 or 15. I was wrong, wasn't I? It was 24 or 25.

Q $24,000 difference, in your favor. If that was excluded, would the effect have been to have increased or decreased the $74,000 loss for the months of January and February?

A The difficulty in my answering that, Mr. Maloney, is I don't know which goods those were and, therefore, I don't know what the material costs were originally, nor of the repair, nor do I know the labor costs of the repair or of the original item. From this document, I can't give you a firm answer.

Q Referring to paragraph 10E of the agreement, the last sentence says, "Operating losses not at a rate in excess of 20,000 U.S. dollars per month for the period from December 31, 1969, to the closing hereof. Shall not constitute an out of the ordinary change of ISL condition."

What was your understanding of the total amount of loss you could have for January and February under that paragraph?

A Total amount of operating loss would have been $40,000.

Q $40,000. I show you a copy of Plaintiff's Exhibit 5, Mr. Kovar, and I ask if that is the document executed

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at the closing concerning the change in the management control provision.

A That's correct.

Q How was that provision changed at the closing?

A You mean what does this letter purport to do?

Q Yes, just with respect to the management control provision.

A It cut down the period one month.

Q Is that the only change it made? It says, "The modification agreement dated February 18, 1970"-- that is the letter that Mr. Lewis had prepared which has been marked here as an exhibit, is that correct, Mr. Kovar?

A Yes, sir.

Q "With reference to the right by Plessey to assume full management responsibilities on the occrrence of certain events is hereby further modified so that if the profits of ISL commencing May 1, 1970 (crediting to the month of May the net profits of the two-month period comprised of March and April, 1970, but not changing any net loss for that period) average less than $15,000 per month, or if there have been three consecutive months of losses during that measuring year (excluding the first two months thereof) this subparagraph shall no longer apply and Plessey shall have the right to assume full management

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responsibilities."

Going back to the first parentheses, describing the crediting for the month of May the net profits of the two-month period March and April, but not changing any loss for those two months, isn't that different from what is in the agreement that was signed on February 18th?

A Yes.

Q Under that agreement, did you have any right to credit profits you made in March and April to the month of May?

A Under the February 4th agreement? No, sir.

Q Let's forget the February 4th agreement, because everybody agrees the lawyers fouled that one up. The February 18th letter, prepared by Mr. Lewis, your attorney, contained the binding management provision, isn't that correct?

A Yes, sir.

Q Under that letter prepared by Mr. Lewis, didn't you testify this morning that the first two months of the measuring period were completely irrelevant to whether or not you attained a $15,000 profit by the third month?

b2 A Correct.

Q So whatever you did under the February 18th letter, in March, April or May, you could not add that to your

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results in June, is that correct?

A That's correct -- add or subtract.

Q But under the provision signed at the closing in Barbados, you were given the right to add any profits from March and April to the results in May, is that correct?

A We were given the contract right to do so, that's correct.

xx (Defendant's Exhibit F marked for identification.)

Q Mr. Kovar, I show you Defendant's Exhibit F for identification and I ask you if you can identify that document.

A Yes. That is a budget document for the year 1970.

Q When was that document prepared?

A November or December, 1969.

Q Was that prepared by you and Mr. Hourihan together?

A Yes.

Q Is that the document which projected sales of $2,400,000 for the calendar year 1970?

A That's correct.

Q Is that the document that projected a profit of $360,000 for the calendar year 1970?

A That's correct.

Q How much profit did that document project for

the month of March, 1970?

A Net before other costs, $26,741.

Q Net before other costs, that is what we discussed on Friday, and that would be your actual profit unless you had some extraordinary item, isn't that correct?

A I don't know how extraordinary -- costs of money, for example -- these would not be ordinary course expenses, that is true.

Q How much profit in December, 1969, were you projecting for the month of April?

A $19,622.

Q How much profit were you projecting for the month of May?

A $16,021.

Q Do I understand your testimony that by March 2nd this forecast was incorrect?

A By December 2nd it was incorrect, and by March 2nd it was also incorrect, because it assumed that we as of January 1st would have full production going and we very well knew in December that there was no way we could have full production going. We didn't have the money to get the material. So that this budget was based upon if we had full operation going. On the basis of the orders and the sales forecasts that we had, this is what we would

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have done for 1970.

Q Was anything hold you back other than the lack of materials?

A I would have to say that that was the primary overwhelming reason.

Q What else was holding you back? Did you have the orders?

A We had sufficient orders to make this budget a viable forecast and budget document, if we had the materials to be able to ship pursuant to order, yes.

Q There wasn't a lack of orders that was holding you back?

A No. I didn't think I had said that.

Q Was there anything else other than a lack of materials that was holding you back?

A As I say, that was the overwhelming reason.

Q Was there any reason for the lack of materials other than the fact that you didn't have money?

A That was it.

Q Once you got the money, how long does it take you to get the materials?

A Well, it depends upon the material you are talking about. We were considering that it would be a two to three month fill up period. Obviously, our obligation would

be to shorten it as much as we could.

Q Referring again to Defendant's Exhibit F, there is a column after the months January to June, "first quarter." Does that represent a total of the months January, February and March?

A I believe so, yes, sir.

Q So based on this budget prepared in December, 1970, you were projecting a net operating profit of $47,000 for the first three months of 1970?

A Yes, sir.

Q What was the loss for those three months, if you recall?

A No, I don't recall. There is something on it around here some place.

Q If you recall your testimony, and I think Mr. McConnell marked an exhibit, but I can't put my hand on it right now -- didn't you testify that in March there was an $18,000 loss on the ISL accounting basis?

A I think that's right.

Q Is that reflected on Plaintiff's Exhibit 14 (handing)?

A Yes, sir.

Q To the best of your knowledge, is Defendant's Exhibit R, prepared by Mr. Hourihan, accurate? That would

be the statement for January and February.

A To the best of my knowledge, that reflected the information we had at the time, yes.

Q Which was a $74,000 loss for January and February?

MR. McCONNELL: Your Honor, I am going to object to that. That is the figure that shows opposite net operating profit or loss, but I don't agree that that was the operating loss of the business because of the figures that go into the makeup of that figure.

THE COURT: Okay. Well, you made that statement.

Q With the reservation Mr. McConnell has mentioned, what was the total loss for January, February and March?

A On the basis of adding these two together, it would be $110,000, give or take a thousand.

Q 74 plus --

A 35.

Q You testified on Friday based on your accounting system it was $18,800?

A Yes.

Q So 74,000 for January and February plus 18,000 based on your system for March would be approximately 92,000 for the first three months?

A That is what that adds up to, but it is apple

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and orange adding. The 74,000, Mr. Maloney, is not a comparable figure to the 18,800. They are not reflecting the same things and are not intended to.

Q Did you give Mr. Hourihan some instructions to change the way you prepared statements from February to March?

A No, I didn't give him any instruction to change. What Mr. Hourihan included in the 74,000, as you well know, is 20,000 plus this legal expense, which is the thing we talked about earlier this morning, which were the expenses we finally got the bills on from local counsel and auditor and the U.S. counsel, which we had agreed with Plessey would be paid by Plessey as part of an ISL expense. 74,000 is a statement which reflects what was paid out, what the expenses were, and one of those expenses was 20 plus thousand for those legal and audit fees. There was another 20,000, approximately, for special bank charges in that 74, which was in fact an expense of ISL and therefore properly recorded on a profit and loss statement, as done by Mr. Hourihan, but not applicable to the earn-out and not, in my opinion, applicable to any operating statement.

b4

Q Did I ask you any statement about the earn-out?

A You asked me to add two figures which were apples and oranges and I was trying to explain my answer.

Q I asked you, without reference to the earn-out, what the loss for the business was for the months of January and February. Now, forgetting the earn-out, isn't it $74,000?

A No. It would be 47,000, because we had a profit on the sale of the villa as a straight accounting matter. The ultimate profit of the company, or loss to the company, in this particular case, would have been 47,000.

Q That was the sale of a fixed asset?

A Yes, sir.

Q That is an extraordinary item, isn't it?

A Yes, just like legal expenses and just like special bank charges are.

Q Referring again to Defendant's Exhibit F, I believe it is the March 2nd amendment -- by the way, do you have a copy of Mr. Lewis' February 18th letter before you?

A I don't believe so.

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MR. MALONEY: That is Plaintiff's Exhibit 4, which has been introduced in evidence.

Q We discussed parentheses crediting to the month of May the net profits and so on and then it goes down to average less than $15,000 per month and there is a comma, and it says, "or if there have been three consecutive months of loss during that measuring year (excluding the first two months thereof)".

Now, you testified that this March 2nd amendment was dictated by Mr. Dubin to your secretary; on Friday, was that your testimony?

A I don't believe so, Mr. Maloney.

Q Do you know how this letter was prepared?

A Are you referring to the February 18th letter that you just handed?

Q I am referring to the March 2nd letter, the amendment prepared at the closing.

A Yes, the March 2nd letter was dictated to my secretary in my offices on March 2nd.

Q By Mr. Dubin?

A Yes, I think so.

Q Did Mr. Lewis participate at all in the drafting of the language in this document, the March 2nd amendment?

A I think so, yes.

Q So, it was jointly prepared by Mr. Dubin and Mr. Lewis?

A Certainly they both participated, yes.

Q You read it over before you signed it?

A I would hope so, yes.

Q Referring to that language that I just quoted, was there any change made in that language from the February 18th letter prepared by Mr. Lewis?

A Yes.

Q Could you tell us what the change was?

A We were moving back the period --

Q No, I am not asking you for a change in your understanding. I am asking you whether the words written on the piece of paper were changed.

A The words written on the piece of paper --

Q Following the "or," Mr. Kovar.

A The March 2nd letter that you were asking me about does not purport to be contract language as such. It purports to explain what change in the contract language the parties agreed to on March 2nd.

Q As of March 2nd, where was the contract language, as you recall it, governing the management control provision?

A The contract language was in the February 4th signing as amended by the February 18th letter.

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Q And the February 4th contract was all wrong, everybody agrees to that.

A It wasn't all wrong. It had a double negative in it and it was corrected in the letter of February 18th.

Q The contract language was found in the February 18th letter?

A Yes.

Q And the March 2nd letter purported to change the contract language, was that your testimony?

A It purported to and did explain what change the parties agreed to, yes.

Q Did it change some of the words in the contract language?

A No.

Q No?

THE COURT: Don't get excited about it.

MR. MALONEY: Excuse me, I apologize.

THE COURT: I don't know whether the witness fully understands the question. Again it is a question of semantics to me.

I think he is asking you to look at the previous agreement on 5D and look at this language and see if there is any difference.

Q Let's take the February 18th letter, Mr. Kovar,

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starting with the "if ISL's profits..." It says:

"If ISL profits, commencing with the third calendar month of the measuring year, average less than $15,000 U.S. dollars per month..."

Now, stopping at that point, was that language changed in the March 2nd letter?

A Yes, the language wasn't changed, but the intent was to change it, yes.

Q The language wasn't changed?

A Mr. Maloney, I don't know how I can explain it other than to say, as I have said before, that the March 2nd letter in my opinion does not constitute a written amendment to the February 4th agreement as amended February 18th. It constituted an agreed upon revision or change that was being made and agreed upon by the parties which would change a June 1st commencing date to a May 1st commencing date.

Now, the earlier contract as amended did not specify June 1st as such. It said commencing with the third full month. That happened to be June 1st. So, the letter said, the parties agree they are going to move that up to May 1st.

Now, that is an amendment of the agreement, but in my opinion that doesn't constitute contract language

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in and of itself.

That may be semantics, but that is what I am trying to say.

THE COURT: I think all of this is semantics, myself. The point I think is that you say that the March 2nd letter changed the first month -- controlling month-- from June to May?

THE WITNESS: Yes, sir.

THE COURT: And he says that the change also provided that any net profits for March and April could be credited?

THE WITNESS: That is correct, sir.

THE COURT: Which wasn't true before. I think out of all this talk you both agreed with each other on that point?

THE WITNESS: I think so; yes, sir.

THE COURT. All right, let's take a luncheon break at this time.

Ladies and gentlemen, you have been very patient in this thing.This isn't easy. I don't know that I understand much of it, but this is all designed so that at some point the lawyers can tell us what it means but I appreciate your cooperation very much and we will resume at 2:15.

(Luncheon recess)

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A F T E R N O O N S E S S I O N

2.15 P.M.

(In open court; jury present.)

A L L A N K O V A R, resumed.

THE COURT: Good afternoon, ladies and gentlemen. You may proceed, Mr. Maloney.

MR. MALONEY: Defendant's Exhibit AB for identification.

xx (Defendant's Exhibit AB marked for identification.)

CROSS EXAMINATION CONTINUED

BY MR. MALONEY:

Q Mr. Kovar, I show you Defendant's Exhibit AB for identification and ask you if you can identify that letter?

A This is a copy of a letter from Mr. Lewis to Plessey, dated March 2, 1970.

Q What was the purpose of this letter, Mr. Kovar?

A I think this was a letter called for under the agreement between us stating legal opinions.

THE COURT: Where was this written, do you know?

THE WITNESS: No, I don't. The date March 2, I know Mr. Lewis was in Barbados at the time, but whether

he had it before, I am not sure.

THE COURT: This was one of the closing instruments, was it?

THE WITNESS: I think so; yes, sir.

Q Was Plessey obligated to close the transaction on March 2nd if it did not receive a letter?

THE COURT: That is a legal conclusion. Can he answer that? I take it he is not a lawyer.

MR. MALONEY: Mr. Kovar is a lawyer, your Honor.

THE COURT: He was a lawyer, let's put it that way. He wasn't a lawyer in this transaction.

This was one of the papers that was passed across the table to Plessey at the time of the closing, is that right?

THE WITNESS: Yes, it may have been the day before or on the day of the closing, but it was one of the papers that, I think, passed as part of the transaction.

Q Do you recall whether there was any discussion surrounding this letter at the closing?

A No, sir; I do not.

MR. MALONEY: Your Honor, may I read a portion of the letter?

THE COURT: It hasn't been admitted yet. Do

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MR. McCONNELL: No, your Honor.

MR. MALONEY: I offer it in evidence.

THE COURT: It will be received.

xx (Defendant's Exhibit AB received in evidence.)

THE COURT: Go ahead and read it.

(Mr. Maloney read from Defendant's Exhibit AB in evidence to the jury.)

Q The original was, apparently, signed by Julius Lewis; is that correct?

A Yes, sir.

Q You recall no discussion of any kind concerning this letter at the closing?

A No, I do not.

Q Did Mr. Lewis discuss this letter with you before he delivered it to Mr. Dubin?

A No, sir.

Q At the closing did you and Mr. Lewis have any discussions concerning your authority to sign the amendments which you signed at the closing on March 2nd?

A Yes, sir.

Q Were Mr. Dubin or Mr. Albert present during those discussions?

A Not during this discussion, no.

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Q Did you tell Mr. Lewis that you did not think you had authority to sign the amendments?

A Yes, I had told everyone that in an open meeting when Mr. Lewis was present. I wasn't talking to him, I was actually talking to Mr. Albert and Mr. Dubin.

Q Do you know when Mr. Lewis had prepared Defendant's Exhibit AB, dated March 2, 1970?

A I think prior to his coming down to Barbados, but I am really not sure, Mr. Maloney.

Q That would be prior to his discussions with you concerning whether or not you had authority to sign the amendments?

A If that had been the case, that would be true, yes.

Q Who do you think you needed authority from in order to sign the amendments, Mr. Kovar?

A Well, I thought I would probably need authority from the shareholders. The February 4 agreement was submitted to the shareholders, pursuant to what I considered to be the requirement of Barbados law, and there were two separate meetings as required, two separate meetings of the shareholders, as required by Barbabos law, to confirm or to approve the sale of the company's assets pursuant to that February 4 agreement as amended February 10th.

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Q Did you make any attempt to get in touch with any amendments of your board of directors to consult with them as to whether or not you had authority to sign the amendments?

A No, sir; I did not.

Q Do you know Mr. Carlen was on March 2nd?

A No, I don't.

Q Did you ask Mr. Dubin or Mr. Albert for additional time within which you could confer with your board of directors concerning this question of authority?

A No, sir; I did not.

Q Was there some reason why you didn't ask them for time within which to consult with the board?

A Yes, sir. I didn't think I had time and I didn't, frankly, want to attempt to find out whether they were bluffing or not that they were going to call off the deal. I didn't think I could take that chance.

Q Did you ask Mr. Dubit if he would give you until the next day or two days later?

A I did not ask for additional time.

Q So, you have no way of knowing whether or not Mr. Dubin would have consented to give you additional time to confer with your board of directors?

A [illegible]

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Q When was the Data 100 loan due, Mr. Kovar?

A It was my understanding that it had been due earlier and by "earlier" I mean in January --

Q As of March 2nd when was the Data 100 loan due?

A It was my understanding the Data 100 had been advised by Mr. Lewis and/or Mr. Albert that our deal was being closed on the 2nd and they would get their money on the 2nd.

Q Had you had any discussions with Data 100 concerning when the loan would be repaid?

A No, sir.

Q So your only knowledge would be based upon what someone else told you?

A That is correct.

Q Now, I show you Defendant's Exhibit G in evidence, which is the letter we discussed on Friday afternoon, dated February 4, 1970, from Data 100 to International Scientific, Ltd., and I ask you if you can tell from reading that letter when the Data 100 loan would become due and payable?

A Well, I think the letter says we are already in default.

Q Yes?

A That means to me that we already owe it.

Q That is correct.

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A And then he is saying, here is a notice of default and we will allow you to cure this either by repayment within 30 days of this notice or by substitution of another party as the guarantor or by further negotiation with Data 100 to satisfy us that an extension of time is warranted.

It is my recollection that both Mr. Lewis and Mr. Albert talked with representatives of Data 100 subsequent to this letter and had indicated that our closing was on March 2 and that Data 100 would be released from the $200,000 guarantee as of that date.

Q How would you gotten the 30-day extension referred to in that letter, Mr. Kovar?

A I hadn't gotten it.

Q I believe you testifiedon Friday that either Mr. Lewis or Mr. Shapiro obtained that 30-day extension for you?

A It is my understanding that they were in conversation with Data 100; that is correct.

Q What was the basis upon which theyobtained an agreement from Data 100 to wait an additional 30 days?

A We were going to close with Plessey. We were going to close a deal with Plessey.

Q Was there any other available source of funds with

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than the money that Plessey was going to give you?

A As of June 30th there was a possibility of other, yes.

Q What was that possibility?

A Well, I was in negotiations with two or three other parties while negotiating with Plessey.

Q You were negotiating with other parties to sell the business to?

A Yes, sir.

Q Will you tell the names of those parties?

A One was a group put together by Mr. Sprouls here in New York, who was a stock broker, and one was with a Mr. Loveman on the West Coast, who was putting together a group. I am not sure of the date, when you say January 30th, there was another negotiation going on with a company in New Jersey.

Q Had any of those other three groups or persons sent anyone down to look at your records and examine the lantby January 30th?

A Yes.

Q Which one was that?

A The two that I named; the company in New Jersey had not yet.

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those parties?

A No agreements had been drafted. There had been merely oral discussions andoral proposals and counter-proposals.

Q Based upon the February 4 letter, what was the date by which Data 100 had to be repaid the $200,000?

A Well, it said within 30 days of this notice.

Q And the notice is dated February 4?

A Yes, sir.

Q So, what would 30 days from February 4 be?

THE COURT: Does it have 28 or 29 days?

MR. MALONEY: I believe we established there were 28 days in February of that year, your Honor.

THE COURT: Assuming that is the fact, what would be 30 days from February 4th?

A March 3rd -- no, March 7th, I guess would be the 30th day.

Q I would suggest it is March 6th, Mr. Kovar.

A I will accept your suggestion.

Q We were at the closing on March 2nd?

A That is correct.

Q So there were four days before Data 100 had to be paid based upon Defendant's Exhibit G, is that correct?

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Q Now, within those four days you could have consulted with the members of your board of directors concerning whether or not to sign the amendment on March 2nd, is that correct?

A If Plessey had given me four days.

Q Did you ask Plessey for the four days?

A No, I had not.

Q You didn't ask?

A That is what I told you, I had not asked.

Q To your knowledge had Data 100 taken any action which would have shortened the 30 days which it gave you under Defendant's Exhibit G?

A I recall no such action other than the fact that we had advised them and that my recollection or my understanding was that Mr. Albert had advised themthat they would be paid on the 2nd.

Q But to your knowledge they had not threatened to take the stock and foreclose on the loan if they weren't paid on March 2nd, is that correct?

A That is correct.

xx (Defendant's Exhibit X marked for identification.)

Q Mr. Kovar, following the closing on March 2nd, did you make any report to your board of directors concerning

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what had happened at the closing on March 2nd?

A Yes, I think it was the 3rd, actually, that the closing was completed.

Q All right. Following the completion of the closing, did you make any report to your board of directors concerning what had happened at the closing?

A Yes, in part.

Q I show you Defendant's Exhibit X for identification and I ask you if that is the report which you made to your board of directors?

A This would have constituted the report; yes, sir.

Q In addition to this written report, dated March 5, 1970, did you make any oral report to the board of directors?

A Not at that time.

Q When is the first time that you recall making an oral report to your board of directors concerning what happened at the closing on March 2nd?

A Well, I dont recall that there was any meeting of the board until Junes, so that the only oral report, as you refer to it, would have have taken place at that June meeting.

Q Can you fix the date of that meeting?

A I think that was June 9.

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having any discussions with Mr. Carlen concerning what had happened at the closing?

A No, sir.

Q By the way, was Mr.Carlen the chairman of the board of directors of your company?

A No, sir.

Q He was just a member of the board of directors?

A That is correct.

Q Who was the chairman of the board of directors?

A Mr. Van Bellingham.

Q Do you recall any oral discussion between March 2nd and June 9th with any of the directors concerning what happened at the closing?

A I do not recall any specific conversations.

Q Now, at the closing you say you had doubts about your authority to sign the amendments?

A Yes, sir.

Q Did you request that Julius Lewis, your attorney, take any action with respect to obtaining approval of the board of directors for what you had done on March 2nd?

A No, sir.

Q Where did Mr. Lewis go after the closing?

A I assume he went back to Chicago.

Q What is [illegible]

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A That is correct.

THE COURT: Do you remember when he left? You closed on the 2nd, didn't you?

THE WITNESS: It actually was on the 3rd.

THE COURT: You finished up on the 3rd?

THE WITNESS: We went over on to the 3rd and I am not sure whether he left that night or whether he stayed over another day or so.

Q But he was there during the entire time when the amendments were negotiated and signed; that is correct, isn't it, Mr. Kovar?

A Yes, sir.

Q Now, referring to your written report, Defendant's Exhibit X, to the board of directors, dated March 5th, could you tell us where in that report you reported to the board of directors concerning the amendment changing the management control provision?

A I did not include it.

Q You didn't include any discussion of the change in paragraph 5-D in this written report to your board of directors?

A That is correct.

Q Of the two changes in the contract, Mr. Kovar,

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the interest on the additional $200,000 and the other changing the management control provision, which one was more important?

A As it turns out or as I thought then?

Q Either way or both ways, Mr. Kovar.

A As I thought then, the additional 200,000 I thought was more important.

Q And why, then, did you think the additional $200,000 was more important?

A Because it clearly and obviously would require us to earn $20,000 more.

THE COURT: For the full year?

THE WITNESS: Correct.

Q The effect of the amendment concerning the $200,000 was that you would pay the interest at the rate of 10 per cent per year, is that correct?

A On that 200,000, yes, sir.

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T2 Q And that would be the total of $20,000 over the course of the full year?

A That is correct. The original agreement said that Plessey would advance at least $600,000 at no interest cost to the earn-out formula. The amendment said the next 200,000 over 600,000 would be at 10 per cent interest.

Q What effect would that inclusion of $20,000 of interest have?

A Well, it would mean that we would have agreed to 20,000 more expense before we start making profit for that year.

Q So instead of $360,000 profit you would have to make, in effect, $380,000 profit?

A That is one way of comparing it, yes, sir.

MR. MALONEY: May I read a portion of Defendant's Exhibit X? Is there any objection to X?

MR. McCONNELL: Defendant's Exhibit X received in evidence.

THE COURT: Go ahead.

MR. MALONEY: This is dated March 5, 1970, and it is addressed to R. Carlen, L.G. Haggerty, V.L. Johnson, and L.G. Van Bellingham --

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of the board of directors in addition to yourself in March, 1970?

A That is correct.

Q "From E.A. Kovar.

"Subject: Plessey acquisition and ISL acquisition.

"Attached hereto are the minutes of the two Shareholders' Meetings approving the sale to Plessey."

THE COURT: Let me ask a question here.

These shareholders' meetings were held in Barbados?

THE WITNESS: Yes, sir.

THE COURT: And these were the minutes of the Barbados meetings?

THE WITNESS: That is correct.

THE COURT: Do you remember when they were held?

THE WITNESS: I think it was February 14th and February 24th or 28th.

b2

THE COURT: Were they held by proxy, I suppose?

THE WITNESS: Yes, the majority of shares voting were by proxy.

THE COURT: Who was the proxy?

THE WITNESS: Myself.

THE COURT: You were the proxy for all the shares?

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THE WITNESS: Yes.

MR. MALONEY: "Also attached at the unaudited 1969 financial reports. You will note a sizable difference between earlier estimations and final results. The major causes of this difference are separately noted, however, it is quite clear that the financial deterioration of the company was very rapidly gaining momentum."

Q Now, are those the financial statements which have been marked as Defendant's Exhibit AZ here, together with Mr. Hourihan's covering letter of March 2nd, which were delivered at the closing?

A That is correct.

MR. MALONEY: "As a result of this deterioration, Plessey stated that it would have to put in $800,000 at the outset, rather than $600,000. It said it would do this, but it would charge ISL 10 per cent for the extra $200,000. All other moneys subsequently put in (over the $800,000) shall be without charge. We discussed this point at length, but they were obdurate and I had no choice but to agree."

Q Now, Mr. Kovar, between the date when you sent this written report to each of the directors in that board of directors' meeting in Chicago in June did any of the directors question your agreement to the arrangement on the additional $200,000?

A Not to my recollection, no, sir.

Q Was there some reason why you did not include any discussion of the change in paragraph 5D in this written report?

A Yes.

Q What was the reason?

A One, I didn't think that it really had significance. Dubin's explanation of why it was necessary made absolutely no sense to me. And I thought that it was put in by him to justify, frankly, his legal expenses, a lawyer wanting to make a change to show that he was part of this and was representing his client. And, secondly, I felt that we were going to be able to reach the average called for, and that, therefore, it would not have any effect upon our deal.

Q Mr. Kovar, I was suggesting that Mr. Dubin was afraid that he would not be able to collect his professional fee unless he made some change in the contract at the closing?

A I didn't suggest any fear on his part at all. All I suggested is that Mr. Dubin in my estimation was trying to put something in the agreement that he could explain had been his doing, thereby justifying his position.

Q Justifying what position?

THE COURT: There is no reason going into why lawyers do something at a closing. You can talk about that for weeks. That is his opinion.

Q Who was the principal negotiator for Plessey Incorporated with respect to this transaction, Mr. Kovar?

A I think that would be hard for me to define. I suppose I would have to say Mr. Sinsheimer, although he didn't participate directly in any of the language or specific terms, but as the man ultimately responsible I think I would have to identify him as the principal.

Q Is Mr. Sinsheimer also an attorney?

A Yes.

Q Mr. Dubin is his partner?

A Correct.

Q You say that you didn't think the change in paragraph 5D was significant because you thought you could achieve the $15,000 profit level anyway?

A That is correct.

Q So as of March 2nd you believed that you could achieve profits totaling $30,000 in the months of May and June? Is that correct?

A Yes, sir.

Q How about March and April? As of March 2nd did you think you would be able to earn any profits in

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the months of March and April?

A No, sir, nor did anyone else that was involved.

(Defendant's Exhibit AB received in evidence.)

(Defendant's Exhibit Z marked for identification.)

Q Mr. Kovar, I show you Defendant's Exhibit Z for identification and ask you if you can identify that letter.

A Yes, sir, this is a copy of a letter I wrote to Mr. Sinsheimer on February 6, 1970.

Q What was the purpose of this letter?

A Mr. Sinsheimer had indicated to me upon the signing of the February 4th agreement that he planned to come down to Barbados and to inspect our facilities and to sit down with me to work out a plan as to how the operation was going to go for the future. I wrote him this letter with my thoughts as to some of the things that should occur so that he would have an opportunity of considering them prior to his visit to Barbados.

MR. MALONEY: Your Honor, I offer the letter in evidence.

THE COURT: Any objection?

MR. McCONNELL: No objection.

(Defendant's Exhibit Z received in evidence.)

MR. MALONEY: May I read from it?

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THE COURT: Yes, and if Mr. McConnell wants to read part of it, he can.

Q The last paragraph on the bottom of the first page, Mr. Kovar, says:

"To maintain the present low marketing cost (less than 3 per cent of sales) as well as to maintain the tax free status of our U.S. sales, I suggest the continuation of the sales representative method of marketing. This method should be strenghtened, however, with the addition of a Company marketing director and several more Applications engineers. These individuals can be stationed b3 in the United States.

"The engineers, however, should spend at least one to two weeks in Barbados every two months. They should be assigned a particular area of the country and should work with the rep(s) in that area to provide deeper engineering interface with the customers from that area. Their regular visits to Barbados are to make sure that they remain, in fact, applications engineers, who will follow through to production the memory products we build for their customers. This will not only insure more accurate and expeditious start-ups, but would also keep their viewpoint directed toward the pragmatics of memory design."

Q Now, what was the substance of that proposal?

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What were you suggesting that Mr. Sinsheimer do in connection with ISL?

A I thought that it was self-explanatory. Plessey had already hired Mr. Kinkhof, who was supposed to be the head of marketing for Plessey Memory in the United States and he had already hired Mr. McNamara, who was to be an engineer for Memory in the United States, and I was suggesting a way of integrating what had been done with what we had for the long run operation of the company.

Q What did you mean when you said that the method of using sales representatives should be strengthened with the addition of a company marketing director?

A Well, I was attempting to give credence to the fact that they had hired kinkhof and to provide a position for him in the organization.

Q Well, had Mr. Kinkhof been hired in connection with the acquisition of ISL or had he been working with Plessey for some time before?

A He had been hired several months beforethey knew of our availability for sale, our existence, in any event.

Q And you were suggesting that Mr. Kinkhof be made a marketing director who would work with the sales representatives?

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A That is correct.

Q He would be stationed in the United States?

A That is correct.

Q Do you recall where you suggested he should be stationed?

A Well, I had in mind Coral Gables, which is right near the Miami International Airport. I think I said close to Miami.

Q Would that require renting an office?

A Yes.

Q Who was going to pay for that rent?

A Plessey.

Q Plessey? The rent would not be charged against the profits of ISL during the measuring year?

A That is right.

Q Did Mr. Sinsheimer have any obligation to do that under the agreement?

A Any obligation to do what? To open up in Coral Gables?

Q Well, to open any additional office in the United States to assist you with sales?

A No contractual obligation to do so, no.

Q How about the applications engineers referred to in the letter, what was the need for these applications

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engineers?

A Well, as I pointed out in the letter I thought it would be helpful to have engineering support for our representatives to call on customers. As it was at the time, Mr. Keppel or occasionally Mr. Boyce would travel from Barbados to the States and call on different customers with the representatives who were involved in that area, and I thought we could have additional aid in the form of additional engineers who would be assigned to the separate areas of the country and, therefore, would familiarize themselves with particular customers in those areas.

Q They would be stationed in the United States?

A That is what it indicated here, yes, spending a portion of their time in Barbados.

Q Who would pay for those engineers?

A Plessey.

Q It would not be charged against the profit or loss during the measuring year?

A That is correct.

Q Now, on the second page of Defendant's Exhibit Z, I think it is about the third full paragraph:

"The United States office should also have tests and repair capabilities. While our current repair

turnaround time is less than two weeks, a United States based facility would reduce import-expert costs, and could also be a sales advantage."

What were you referring to there?

A Well, when we shipped materials back and forth obviously we had additional costs.

Q These were the returns where the customer would send the product back to be repaired?

A That is correct.

Q Then you would repair it and send it back?

A Yes.

Q The idea of that repair facility, if it was located in the United States it would be both cheaper and faster?

A That is correct.

Q Who was going to pay for that operation?

A Well, as you well can note from the letter, this was not discussed, as to who would pay for it. If you want to know my thought, it was that Plessey would pay for it and it would not be charged against the earn-out.

Q That would apply to all the earnings in this letter?

A Yes, because I was suggesting is a buildup future for Plessey Memory products in the United States.

Q It would also be helpful during the measuring

year to have these services?

A I certainly expected it to be.

Q Now, the next paragraph says:

"Finally, with engineering being located in the United States, a U.S. prototype facility would also be helpful. At this point, however, tax counsel should be obtained to determine if such a facility would endanger the no-tax aspect of the Barbados sales procedure."

Why would it be an advantage to have the prototype facility in the United States?

A Well, with most of the engineers who were working with the customer in the States, obviously, the building of the protytpe to that engineering design, to that engineer's design, would be best to take place where the engineer is.

Q It would be more convenient than having the engineers travel back and forth from Barbados to meet with and discuss the prototype with the customer?

A Yes, in effect, because they would be making design changes as they were building the protytype.

Q Do you know whether during the measuring year Plessey, in fact, did open an office in the United States to perform these functions?

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United States to perform some of these functions, in any event.

Q Do you know whether or not Plessey charged ISL at all for any of these United States operations?

A I do not know that for a fact. I am told that they did not. I am also told that they did include the cost of that operation in their pricing system. So that all quotes given would include this additional $250,000 I am told they expended on the Boston facility.

Q You have no reason to believe that any portion of that $250,000 was charged against ISL for purposes of computing what they would be entitled to under this agreement?

A I don't think I can answer that.

THE COURT: You say you don't know?

THE WITNESS: No.

Q I believe during your direct testimony you indicated that a company called Freight Brokers International was handling all of your purchasing and shipping prior to the acquisition?

A Yes, sir.

Q Scientific Trading Corporation and Intersil had no employees?

A That is correct.

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Q Were you satisfied with the arrangement with Freight Brokers International?

A No.

Q Were they doing a good job?

A They were doing a good job of import-export; they were doing a poor job of purchasing.

Q Was that because of delays in obtaining and shipping materials to Barbados?

A Yes, I would say so.

Q Now, turning to the next to the last paragraph on page 3 of Defendant's Exhibit Z, you say, "Temporarily, at least, I would like to arrange for the use of the Plessey Electronics purchasing facilities. We can continue to use Scientific Trading Corporation as the import-export agent, and material deliveries can be made directly to it. Intersil Limited, our present purchasing agent, has not done a satisfactory job, and this change should be made as quickly as possible."

Now, did Mr. Sinsheimer agree to allow you to use the purchasing facilities of Plessey Electronics? Or did someone else at Plessey agree to that request?

A Yes.

Q Were they obligated to do so under any provision in the contract?

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A No.

Q Now, at the same time that you agreed to have Plessy take over the purchasing and shipping functions from Freight Brokers International, did you also agree to terminate Freight Brokers International as the export-import or customs brokers?

A Not at the same time, no.

Q Well, at some point prior to your termination did you agree to such a change?

A Yes.

Q What was the reason for agreeing to that change?

A The price that was quoted by the Plessey custom broker was less than the price quoted by the Freight Brokers International for continued import-export services.

Q And the Plessey broker was Barnett Freeslate?

A I believe that was the name, yes.

Q Did you meet with people from Barnett Freeslate before agreeing to the change?

A Yes.

Q And you had agreed to the change prior to your termination?

A We had agreed that the change would be made. That is correct.

Q I believe on your direct testimony, Mr. Kovar,

Mr. McConnell introduced as Plaintiff's Exhibit 17 your report to your board of directors dated May 13, 1970, and that report is one that contains your handwritten notation concerning the changes which Mr. Clarke and Mr. Crocker had demanded in early May when they were in Barbados?

A Yes.

Q Now, the two changes that you are objecting to were transferring pricing control to Plessey's marketing director and changing the layout of the work benchs? Is that correct?

A The two changes that I specifically noted in that report included -- I will have to look to the report again, Mr. Maloney.

Q Sure.

A That is correct.

Q And how did you characterize those two requests by Mr. Clarke and Mr. Crocker?

A I characterized them as a corporate directive.

Q I ask you again, was it your understanding that under the agreement that when you received a corporate directive from Plessey you were required to carry it out?

A No, I told you before I did not so understand, nor do I so understand now.

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Q Did you request arbitration with respect to those two provisions under paragraph 5D of the agreement?

A No, I suggested the changes they had in mind would obviously affect the earnings potential, and if they were willing to agree to pay the ISL investors the full amount, that I would be more than happy to comply with the directive. They advised me that they would have to go talk to Mr. Sinsheimer, and the meeting was drawn to a close.

Q Referring to Plaintiff's Exhibit 22 in evidence, which is the comparison of your May and April sales and profit and loss, is there anything unusual about the amount of labor expense that you had in May?

A I can't say that I see anything unusual about it, no.

Q What were the total sales in April?

A $101,100.

Q What was the amount of direct labor cost on those sales?

A $12,000.

Q What was the amount of sales in May?

A $143,462.

Q That is approximately a 40 per cent increase

A Yes, sir.

Q What was the direct labor cost on that 40 per cent increase in sales, or $143,000?

A $8,616.

Q So although your sales had gone up $40,000 your direct labor cost had gone down $4,000?

A Yes, sir.

Q Was that usual?

A It was not. I can't say it was usual or unusual without the backups here and without knowing what was shipped in the month. I have no idea of knowing whether we had heavy labor or intensive items shipped in one month vis-a-vis the other, or whether it meant the labor -- I really don't know. There is no way of my telling. I'm sorry.

Q Well, then, is it true that just taking the amount of sales by itself it's not possible to calculate the amount of profit or loss without knowing each of those specific items for a given month?

MR. McCONNELL: I don't understand that question. I object to the form.

b5 THE COURT: Rephrase it, will you.

Q When we were putting the figures on the blackboard on Friday, Mr. Kovar, we talked about the various items. If you took your sales and then there were various [illegible]

that you subtracted from sales as your direct cost of sales, that gave you a gross profit? Is that correct?

A Yes.

Q Now, the term used on that report, direct labor, is that one of the factors that is used to determine your gross profit? Is that one of the items which is subtracted from sales to give you gross profit?

A Correct.

Q For April you have gross sales of $101,000. Now, what is the manufacturing profit that you showed on that $101,000?

A $12,000.

Q Would that be the gross profit that we were talking about on Friday?

A We were talking about operating profit then, but it would be considered gross profit, yes, or manufacturing profit, or operating profit. You will find in the papers that it was referred to as all three one time or another.

Q But manufacturing profit is gross profit? Let's go back --

THE COURT: The jury and I are going to get plenty confused. I think what you're talking about is certain expense directly attributable to the product itself, is that right, such as cost of materials, cost of

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labor, you take those off first, and then you take off a lot of other things, like administration expense and selling expense? Is that right?

THE WITNESS: That is right.

THE COURT: That is all you fellows seem to be talking about, I think.

MR. MALONEY: Yes. I won't spend any more time on it.

Q Mr. Kovar, I believe on your direct examination Mr. McConnell asked you whether on May 25th Plessey could have known what the results for May would be, and I believe your answer was that they could not? Is that correct?

A That is correct.

Q Well, do you recall in April the volume of sales which you had forecast for the month of May?

A No. It is on one of those reports.

Q Would that be Plaintiff's Exhibit 25 in evidence?

A No, this is Mr. Peter Hewitt's report, and he has shown a May forecast of $135,000.

Q Do you recall whether that was correct?

A The net figure was closer to $142,000.

Q Do you recall in April whether or not you were forecasting sales of $135,000 for May?

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A Well, if yougive me my earlier forecast I can tell it to you exactly.

THE COURT: Let's take our afternoon recess.

(Recess.)

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T3

(In open court; jury present.)

xx

(Defendant's Exhibit D marked for identification.)

BY MR. MALONEY:

Q Mr. Kovar, I show you Defendant's Exhibit D for identification and I ask you if you can identify that document?

A Yes. This is a 1970 sales forecast which I prepared on or about the 5th of December, 1969, as a result of the sales reps meeting in Barbados.

Q Does that list a series of customers with different amounts across from their names?

A It does.

Q What is the total figure for the sales forecast on that document?

A $3,625,840.

MR. MALONEY: I offer it in evidence, your Honor.

THE COURT: Any objection?

MR. McCONNELL: May I see it?

No objection.

THE COURT: It will be received.

xx

(Defendant's Exhibit D received in evidence.)

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was prepared and where the figures come from with respect to the potential order from each customer?

A Yes. I had a meeting of oursales reps in Barbados I believe the 1st, 2nd and 3rd, anyway the first few days of December, 1969, at which most of the reps were present and we asked each one to describe what his forecast was for his particular area and on the basis of that meeting and the figures that I took down from their forecast, I then drew up this document.

Q So taking, for example, Nuclear Chicago, do you recall who the sales rep was who called upon Nuclear Chicago?

A John Grey.

Q So this was John Grey's estimate that he would be able to obtain an order for $100,000 during 1970?

A That is correct.

Q Each figure would have been arrived at in similar fashion based on the best estimateof thesales rep for each of the customers?

A Yes. In all cases it probably would not be a specific order for that amount, but in the years time he thought he would get orders amounting to that amount.

THE COURT: Estimate of the sales?

THE WITNESS: Right.

Q Did this estimate include only products that

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would be delivered during the 12 months of 1970?

A I think so.

Q So, to the extent that he was hopeful of obtaining a contract that would call for two years of deliveries, on this document you only record the amount of product that would be delivered during the 12 months of 1970, is that correct?

A That is correct.

MR. MALONEY: Your Honor, Defendant's Exhibit F for identification is the International Scientific, Ltd. budget 1970. I would like to offer that in evidence at this time.

THE COURT: Any objection?

MR. McCONNELL: It is already in as Plaintiff's Exhibit 13.

MR.. MALONEY: Yes, I believe it is the top sheet on that bulky exhibit, your Honor.

xx (Defendant's Exhibit F received in evidence.)

Q Taking Defendant's Exhibit F, Mr. Kovar, once again that is estimated sales for the full 12 months of 1970 in the amount of $2,248,000; is that correct?

A Yes, sir.

Q Now, Defendant's Exhibit F was also prepared

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some time in November or December of 1969; is that correct?

A Correct.

Q Would that have been following your meeting with the sales representatives at which you prepared Defendant's Exhibit D7

A Probably.

Q Could you explain the difference in the figure of total sales forecast of $3,600,000 on Defendant's Exhibit D and the forecast of $2,400,000 on Exhibit F?

A Yes.

Q Would you do so, please?

A It was my conservative cutting back of projected sales by one-third, approximately, to then use as a budget figure for the coming year. I knew in December that we weren't going to be able to start in January on a full tilt basis, but I wanted to set forth for my board what I considered to be a realistic budget for the coming year and I took our sales figures of 3.6 million and advised Mr. Hourihan to only use two-thirds of that as projected sales and to compute the budget on the basis of that figure.

Q So this was just an arbitrary cutting by one-third rather than going through here and estimating how much of the amount for each customer should be included in the 1970 budget forecast?

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A That is correct.

Q Looking at Defendant's Exhibit D, the document prepared based on the sales reps meeting, we show Magnavox $670,000. Now, how much of that $670,000 would be included in the budget for Defendant's Exhibit F?

A You would have to look to the back of figures to determine that. There is no way I can tell from the face of it.

When I told Mr. Hourihan to use 2 million 4 as the total sales figure, he then had to go back and work the sales forecast back to that figure. Whether he did it on an individual pro rata basis per customer, frankly there is no way I can tell from this.

Q As of December, 1969, did you have an equal opportunity to obtain each one of these contracts or were your chances of getting one better than your chances of getting some other?

A The 3 million 6 represented our sales reps best estimate as to what they would get. I don't believe that that estimate was put in terms that they have a 93 per cent as compared to an 85 per cent. I think what they were saying is that this was what they realistically felt they were going to be able to get for us for delivery during 1970.

op6 Kovar-cross

Q At that meeting was there any discussion of each customer?

A Yes.

Q Now, for example, the third customer says Collins. It says $11,300.

We have also seen Magnavox, $670,000.

Was there any discussion of whether our chances of getting the $11,000 order were better or worse than our chances of getting the $670,000 order?

A Yes.

Q So, when it came to reducing the figures on this sheet to arrive at the $2,400,000 figure, wouldn't you have to make some judgment with respect to which orders you had a better chance of obtaining than some other orders?

A Not on that basis, no.

Q Did Defendant's Exhibit D, the sales reps forecast, prove to be an accurate forecast of sales that could be obtained during 1970?

A Did it prove to be? You mean did ISL ship this volume in 1970? The answer is no, sir.

Q Up until the time you were terminated, had ISL been able to obtain all of the orders which it thought it would be able to obtain by May, 1970, based on this projection?

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A No, some of them had had received and cancelled on. Some of them it had not received yet.

xx (Defendant's Exhibit CI marked for identification.)

2 Q Mr. Kovar,I show you Defendant's Exhibit CI for identification and ask you if you can identify that document?

A It's a copy of a letter I wrote to Mr. Tucker,our supervisor of sales reps, on 20 April, 1970.

Q There is handwriting on it. Could you tell us whether the attachment to that letter is the same as Defendant's Exhibit D without the handwritten comments?

A That is correct.

Q Do you know who put the handwritten comments on your letter and on the attachment?

A That is Mr. Tucker's handwriting or printing.

Q Did he return the letter to you with the handwritten comments on it some time in April, 1970?

A I would think so, yes.

MR. MALONEY: I offer it in evidence, your Honor.

THE COURT: Any objection?

MR. McCONNELL: No objection.

THE COURT: Received.

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xx

(Defendant's Exhibit CI received in evidence.)

MR. MALONEY: May I read the letter, your Honor?

THE COURT: Go ahead.

(Mr. Maloney read from Defendant's Exhibit CI in evidence to the jury.)

Q Could you explain to the jury what Mr. Tucker meant by No. 4, Mr. Kovar?

A Yes. A sales booking, he was referring to as delivery, as sales, and he was saying, in effect, he couldn't do that because that was controlled, at least in part, by plant capacity and thereby affected by backlog of present orders.

So, he said that he would prepare a bookings forecast which would attempt to forecast what kind of orders he could procure, not that we would deliver, but that he could procure.

Q So Mr. Tucker did not have sufficient knowledge to be able to tell whether or not ISL could deliver all of the orders which he could obtain; is that correct?

A Well,that is correct. We had not been delivering up to that point, so he had an idea that we were not delivering to orders.

Q What was Mr. Tucker's background?

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A Mr. Tucker was an independent marketing man for some years prior to his association with us. Prior to that I understand that he had been sales manager or marketing manager for a division of Litton Industries.

Q He had no manufacturing experience or engineering experience, did he, as such?

A That I don't know.

Q Now, turning to his marked-up copy of Defendant's Exhibit D, which is attached to his letter, next to Cambridge we have a figure of $269,000 and then 500 at 538, prototype failed.

Now, is it correct that 500 at 538 is merely an explanation of how we arrive at the $269,000 figure?

A That is correct. That number of units at that price.

Q What does Mr. Tucker's comment that prototype failed mean?

A That the prototype hadn't been accepted as of this point.

Q Would you be able to obtain the order for $269,000 until a prototype did qualify?

A No, generally not, and with the Cambridge memory we could not have.

Q By the time you were terminated on June 11, 1970,

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had you built a prototype to the satisfaction of Cambridge?

A That I don't know. I don't recall.

Q Going down, he says, Compat, $250,000, and he has written the comment "Booked."

Does that mean that he had actually obtained a written order from Compat in the amount of $250,000?

A Yes, that would be my understanding of that.

Q Going a little further down we have IBM with a C in parenthesis, $90,000. The handwritten comment "Customer requirements cancelled." What would that mean, Mr. Kovar?

A The IBM C means IBM Canada and it would indicate that he said the customer requirements were cancelled.

Q Do you recall if that was cable harness work?

A I think it was.

Q So, ISL would not be able to obtain that order because the customer no longer had any requirement for the product; is that correct?

A That would be correct.

Q Now, there is a company ICC. Could youtell us what company that is?

A Information Control Corporation, I believe.

Q We have a figure of $180,000 for the order and the handwritten comment "Cancelled due to delivery." Could you

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explain what that means?

A Due to our failure, apparently, to deliver on time, he was saying that the order was cancelled.

Q Do you have a recollection that that was the fact?

A No, as a matter of fact, I don't.

Q But Mr. Tucker would know, wouldn't he?

A He should know. However, subsequent to that I talked with ICC and my recollection is that we were still talking about continuing the order.

Q You were trying to clear up the delivery problems and asking them to let you continue building the product for them?

A Yes.

Q Do you have any recollection by the time you were terminated on June 11th whether that dispute had been resolved and whether or not they had agreed to let you continue deliveries?

A I don't have a specific reollection of it.

Q By the way, Mr. Kovar, have you had an opportunity to refresh your recollection in preparation for this trial by reviewing the customer files for these various customers?

A I don't have the customer files, nor have I seen them.

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Q I don't think that was my question.

A I haven't reviewed them if I haven't seen them, Mr. Maloney. That is what I am saying.

Q When is the last time you recall looking at the customer files for ISL?

A It would have been prior to June 5, 1970.

Q Mr. Kovar, do you recall coming to my offices in New York City last year with Mr. McConnell to review documents in connection with the preparation of this case?

A Yes, sir.

Q Did we make a file cabinet full of customer files available for your review?

A You made a number of cardboard boxes of documents available for our inspection.

Q You don't recall us also making a metal file cabinet with four drawers in it available for your inspection?

A In the conference room, yes.

Q We wheeled it into the conference room and left it right there with you and Mr. McConnell; is that correct?

A Yes.

Q You and Mr. McConnell had an opportunity to review all of the files in that cabinet; is that correct?

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Q Going down, I see Raytheon, $88,500. The comment "Booked then cancelled due to non-delivery."

Could you explain that comment, please?

A Mr. Tucker is saying that the order was booked but then it was cancelled due to non-delivery.

xx (Defendant's Exhibit CJ marked for identification.)

Q Mr. Kovar, I show you a copy of Defendant's Exhibit CJ for identification and I ask you if you can identify that exhibit?

A It is a copy of a bookings forecast, dated May 24, 1970, which is in Mr. Tucker's hand printing.

3 Q Did he send that to you on or about May 24, 1970? Mr. Kovar, up in the corner I think it says "XC," which would be Xerox Copy, to DAK 5/24/1970. Does that refresh that recollection?

A I don't know whether I saw it before I left. I am sure that he would have sent it to me.

Q You have no recollection of whether or not you saw it?

A No, sir.

MR. MALONEY: I offer it in evidence, your Honor.

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THE COURT: Received.

xx (Defendant's Exhibit CJ received in evidence.)

Q Mr. Kovar, is this the document which Mr. Tucker prepared in connection with his comment No. 4 that we just discussed?

A I would think so; yes, sir.

Q So, the terms ISL's sales potential and booking forecast at the head of the two columns would mean substantially the same thing as you explained in connection with Item 4 on your letter dated April 20th?

A That is correct.

Q Turning to page 2 of this document --

THE COURT: Which document?

MR. MALONEY: CJ.

THE COURT: Okay.

Q Could you explain to the jury what each of those columns means running across the base?

A Well, the first column is the customer. He notes the customer program so that I assume subsequently he may break down a particular customer into several either geographic areas or particular product lines or something of that sort.

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where their officer is located?

A Yes. In some cases he notes the location.

Q What is the second column?

A It would be a description of the particular product that is involved.

Q That would be, for example, I see one down here for Sanders, 4K x 18 3W. Is that what we discussed on Friday afternoon with the Magnavox prototype? It would be four times K which is a thousand times 18 which would determine the number of cores in the plane or stack?

A Correct. 3W refers to three wire.

Q That means there would be three wires going through each of these various small little cores?

A Yes, sir.

Q The next column ISL's sales potential?

A Yes.

Q What did Tucker mean by that?

A Well, as I recall from the prior report that he had made, he is indicating that of their total purchases of that product line, that we have a potential of X thousand dollars.

Q Would this be similar to what we discussed on Friday afternoon with Magnavox, that out of the total amount of this product that the customer was buying, he thought

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that ISL had a chance to get this much of the order?

A That would be correct.

Q Then he has a column Capture Odds, which we discussed on Friday afternoon?

A Yes, sir.

Q And then bookings forecast is arrived at by multiplying the Capture Odds times the ISL sales potential?

A Correct.

Q So, for example, on Honeywell-Boston he has a product there, $300,000 with Capture Odds of 50 per cent would be a bookings forecast of $150,000?

A Correct.

Q So that as of May 24, 1970, this was Mr.Tucker's best estimate of the amount of a written order he could obtain from that customer, is that correct?

A That is correct.

Q The next column says Capture Month. Would that indicate the month of the year in which he thought he could obtain the written order?

A Correct.

Q And then Monthly Rate. What does that mean?

A The number of units that he thought would have to be produced per month under that contract.

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that right?

A Yes, sir.

Q So, taking an easy one, I see one is monthly rate of 50 units,the price is $100, that would mean there would be shipments of $5000 a month to that customer for that product if you could obtain that order; is that correct?

A Yes, sir.

Q Then he makes various comments in the last column pertaining to whetheror not a prototype would be required before you obtained the order and various other items; is that correct?

A That is correct.

xx (Defendant's Exhibit AH marked for identification.)

Q Mr. Kovar, I show you Defendant's Exhibit AH for identification and ask you if you can identify that document?

A This is a copy of a memorandum from me to Mr. Frank Parr and to Bill Tucker, dated May 26, 1970.

Q Who is Mr. Parr?

A Mr. Parr was the marketing manager hired by Plessey for the U.S. office.

Q So rather than Mr. Kinkhoph,Plessey decided to [illegible]

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States?

A Yes, Mr. Kinkhopf had been terminated.

Q Was Mr. Parr working with Mr. Tucker in connection with visiting customers and setting prices?

A He was working with Mr. Tucker in calling on our reps. He had nothing to do with setting prices.

Q So, up until the time you were terminated, you established the prices which would be quoted to the customers; is that correct?

A Yes, sir.

Q Did Mr. Tucker have any discussion with respect to changing those prices?

A He could increase them.

Q He could increase them, but he could not lower the price which you gave him to quote?

A That is correct.

MR. MALONEY: I offer the document in evidence, your Honor.

THE COURT: Any objection?

MR. McCONNELL: May I just take a look at it?

(Pause.)

MR. McCONNELL: No objection.

THE COURT: It will be received.

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(Defendant's Exhibit AH received in evidence.)

(Defendant's Exhibit CK marked for identification.)

MR. MALONEY: Your Honor, Defendant's Exhibit CK for identification has been prepared by us in order to summarize some of the information on Mr. Kovar's December, 1969, forecast, Mr. Tucker's May 24th bookings potential forecast and the memorandum of Mr. Kovar, dated May 26, 1970, and since this material is somewhat difficult to follow, I have prepared copies of this document which I would like to give to each of the jurors so they can follow the comparisons we make in these various sales forecasts.

THE COURT: Have you had a chance to check these?

MR. McCONNELL: Your Honor, I have never seen this document before.

THE COURT: I will give you a chance to check them.

MR. McCONNELL: If he had told me over the week-end, we could have checked out the various exhibits, but I haven't seen this.

THE COURT: I want you to check them out before they are passed around to the jury.

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MR. MALONEY: All right, your Honor.

THE COURT: You can check them later this afternoon. This, I take it, is purely a summary?

MR. McCONNELL: I am not questioning it, you know, until I have a chance to look at the exhibits.

MR. MALONEY: I will be glad to make any corrections to it in the morning. All it does is list the amount of the order for each customer appearing on the three different documents.

THE COURT: I would like to give you a chance to look at these before they are shown to the jury, so we can do that tomorrow morning after they have had a chance to check it.

MR. MALONEY: Would this be a good time to stop then, your Honor?

THE COURT: Have you anything else you would like to explore?

MR. MALONEY: I have another matter, but I would like to go through this material first as it will be very confusing if we do it without the jury having this to follow. There are 25 customers on three different documents.

THE COURT: Nothing has happened in the last little while that has helped the confusion, but if you

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have another subject you could go on with this afternoon, we can go on with this tomorrow morning after they have had a chance to correct them.

MR. MALONEY: All right, your Honor.

THE COURT: We will come back to this after you gentlemen have had a chance to look at the figures.

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THE COURT: Another thing about this Exhibit CK, I don't think the heading means much. I think you got to think up something at the beginning or the end, so that the jury and I will know what all this is supposed to prove.

MR. MALONEY: We will do that tonight, too, your Honor.

xx

(Defendant's Exhibit AA marked for identification.)

BY MR. MALONEY:

Q Mr. Kovar, I show you Defendant's Exhibit AA for identification. I ask you if you identify that document.

A This is a copy of a letter dated June 17, 1970, to Mr. Sinsheimer from Mr. Carlen.

Q And was that Mr. Carlen's response to Mr. Sinsheimer's letter of June 9, 1970, which has been introduced in evidence as Plaintiff's Exhibit 26?

A I think I would probably characterize this as the response of the directors of Scientific holding to that June 9th letter.

Q That was not just a personal letter from Mr. Carlen, but it was written pursuant to considered judgment and decision by the board of directors of ISL?

A Yes, sir.

Q Mr. Sinsheimer's letter of June 9th, Plaintiff's

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Exhibit 26, was the written notice by which Plessey assumed management control of the business?

THE COURT: Give it an exhibit number.

MR. MALONEY: Plaintiff's Exhibit 26, your Honor.

A I think so, yes.

Q I believe on your direct testimony Mr. Kovar, you indicated that after Mr. Clarke or Mr. Albert had handed you Plaintiff's Exhibit 26 in Mr. Sinsheimer's office on June 11th, you went back to Chicago because your son was ill?

A May I see 26 to make sure that I know what you're talking about?

Q Yes.

A Yes, I said I immediately did go back to Chicago and I did say that my son was ill.

Q Did you make copies of Mr. Sinsheimer's letter, Plaintiffs Exhibit 26, available to each of the members of the board of directors?

A I think so, yes.

Q Was this the first notice to the directors that there had been a change in paragraph 5D on March 2nd?

A No. I met with some of the directors on the 9th of June and that would have been the first discussion.

Q Do you recall which directors they were?

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A I think it was Mr. Carlen, Mr. Haggerty, and I think Mr. Johnson as well.

Q On June 9th you had not yet received Mr. Sinsheimer's letter?

A That is correct.

Q What was Mr. Carlen's reaction when you told him that you had agreed to a change in paragraph 5D at the closing?

A He was indignant with me.

Q Well, anything else?

A I think that characterizes hisreaction.

Q Did he ask you what the nature of the change was?

A Well, yes, I had explained what the change was and he was indignant that, one, I had made the change, and, two, that I had not so advised the board of directors immediately thereafter.

Q Did you make a copy of the written amendment dated March 2nd available to him?

A Well, I don't know that I had it in hand, but we would have gotten copies of it if they hadn't already received the documents.

Q And on June 11th you came to New York City and you received Plaintiff's Exhibit 26 from either Mr.

Albert or Mr. Clarke?

A That is correct.

Q You then returned to Chicago?

A That is correct.

Q I believe you testified that you then left Chicago and went back down to Barbados? Is that correct?

A Yes, sir.

Q Did you return to Chicago on June 11th?

A Yes.

Q Do you recall how long you remained in Chicago before you returned to Barbados?

A Three days, I believe.

Q And during that three days were there meetings with one or more members of the board of directors to discuss what should be done in response to Mr. Sinsheimer's letter of June 9th, which is Plaintiff's Exhibit 26?

A I'm not sure they were meetings; they were discussions, but I think they mostly took place by way of telephone.

Q Do you recall ever being in the same room with Mr. Carlen between June 11th and what was it -- you said June 17th?

A As to what?

Q [illegible] you returned to Barbados.

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A I said I thought it was three days. My reaction is I left back for Barbados on Sunday, so that would have been, I think, the 14th, and I stayed down in Barbados a day, maybe a day and a half or so, and then I came back to Chicago, I think.

Q Would you have been in Chicago on June 17th?

A I'm really not sure.

Q Well, during this period from June 11th to June 17th do you ever recall being in the same room with Mr. Carlen with a copy of the March 2nd amendment and discussing what it meant?

A Yes, I think that took place on the 9th.

Q What did you say to Mr. Carlen and what did he say to you?

A I don't remember the exact words, but the import of the discussion was on the 9th that I told him that I had been advised that Mr. Sinsheimer wanted to see me on the 11th. I had previously advised them of the directives that had been given and then the total silence from Plessey.

Q Was there any discussion whether or not Mr. Sinsheimer was attempting to assume management control one month early?

A I thought that is what I was trying to answer for you.

Q Well, did you say that to Mr. Carlen?

A Mr. Maloney, I told you I don't remember the exact words. If you want me to try to relate to you the discussion that took place at that meeting as best I can, I will do so.

Q Without remembering the exact words, do you remember either you or Mr. Carlen saying how can Warren Sinsheimer assume management control now because we have an additional month to bring our profits up to an average of $15,000?

A That point would have been made, yes.

Q That definitely would have been said?

A Yes.

Q Do you recall what Mr. Carlen said concerning that subject?

A Well, he wanted to know what legal right they had to do so.

Q Do you recall who else was present at this meeting with Mr. Carlen?

A Well, as I say, I think Mr. Haggerty and Mr. Johnson and myself, Mr. Murray, and I believe Mr. Shapiro.

Q Who is Mr. Murray?

A Mr. Murray was a law partner of mine and was an investor in ABL.

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Q What is Mr. Murray's first name?

A Matthew.

Q Is he an attorney?

A He is.

Q Do you recall whether Julius Lewis was present at the meeting?

A I'm not sure whether he was present at that meeting. I think Harold Shapiro was, but I am not sure about Julius.

Q Harold Shapiro had not been at the closing in Barbardos?

A That is correct.

Q Now, with all of these gentlemen present was there some discussion of what should be done because Warren Sinsheimer was attempting to take over management control one month earlier?

A We didn't know that for a fact on June 9th. This is what we suspected was going to happen, but we didn't know that on June 9th. What we did know was the report that I had given them as to the directives that had been given me. What we did know was that Plessey had failed to respond to my questions thereafter as to what was happening. And what we did know was that I had been called and told that Mr. Sinsheimer wanted to meet with me on June 11th in his office.

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Q So on June 9 you knew there was a possibility that Mr. Sinsheimer was going to assume management control based on the fact that you had not made a $15,000 profit in May?

MR. McCONNELL: That is not his testimony. I think that is a mischaracterization of his answer.

MR. MALONEY: I withdraw the question.

THE COURT: Can you answer the question?

THE WITNESS: I suspected that he was going to do that based on the silence of Plessey to my repeated questions after the May meeting.

Q At this meeting was there a discussion of what your response should be?

A There was a discussion.

Q How were you directed to respond to Mr. Sinsheimer if he attempted to take over management control?

A My instruction was to report back to the board with what he did, what he, Sinsheimer did or said.

Q Was there any discussion of whether or not you should say to Mr. Sinsheimer that he had no right to take over based on the results of May alone?

A No, the discussion really was that I was to do nothing, that I was then to report back to the board members.

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sheimer would be or on what basis it would be, and my instruction was to bring the information back as quickly as possible.

Q You did that on June 11. Was there another meeting between June 11 and June 17, at which you and Mr. Carlen and Mr. Shapiro and Mr. Lewis were present?

A I don't believe so.

THE COURT: You don't remember?

THE WITNESS: I don't remember any such meeting.

Q Do you remember attending any meetings with Mr. Carlen between June 11 and June 17?

A No, sir.

Q Did you attend any meetings with Harold Shapiro between June 11 and June 17?

A I believe I met with Harold and/or Julius.

Q Do you recall whether you met with Julius?

A I say it would have been either one and possibly both, Harold and Julius, at their offices.

Q Did you discuss with either Mr. Shapiro or Mr. Lewis what ISL's response should be to Mr. Sinsheimer's letter of June 9, Plaintiff's Exhibit 26?

A Yes.

Q What was the substance of that discussion?

A The substance of the discussion was that I was

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suggesting we bring suit.

Q You recommended that a lawsuit be commenced immediately?

A Yes, sir.

Q On what basis?

A That the takeover was in violation of our agreement.

Q Did you recommend that a motion be brought immediately for a preliminary injunction to stop that action?

THE COURT: He was acting as a client here. Whether the lawyer might advise him?

MR. MALONEY: I withdraw that, your Honor.

Q Did Mr. Shapiro or Mr. Lewis recommend that you attempt to obtain a preliminary injunction stopping Plessey from assuming management control in June?

A No, sir.

THE COURT: Where would this injunction have been issued? In Barbados?

MR. MALONEY: I assume, your Honor, they could have come here and applied for it.

THE COURT: What good would that have done?

MR. MALONEY: Well, Plessey Incorporated offices are here in New York City and I am sure Mr. Sinsheimer would not have disobeyed any order that would have come from

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this Court.

Q What was finally decided between you and Mr. Shapiro and Mr. Lewis as to what response should be given to Mr. Sinsheimer?

A The three of us did not make the decision. The conversations that took place, my recollection, my personal conversations were limited to those two. There were some telephone conversations with other board members and there was a final decision made that Mr. Carlen would send a letter to Mr. Sinsheimer.

Q Is that the letter dated June 17 which we have just introduced in evidence?

A Yes, sir.

THE COURT: That is Exhibit AA? Is that right?

THE WITNESS: Yes, sir.

Q Prior to March 2nd, the day of the closing, when was the last time that you spoke to Warren Sinsheimer?

A I don't recall the date. My recollection, there may have been a phone conversation that took place when he indicated that he was not coming to Barbados.

Q Between March 2nd and June 9th do you recall having any meetings with or telephone conversations with Mr. Sinsheimer?

A I think that I would have had some conversations

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with him, but they would have been fairly perfunctory, brief conversations that might have taken place when I was in his offices in New York.

Q Do you recall any discussion with Mr. Sinsheimer concerning the change in paragraph 5-D that had been made on March 2nd?

A No, sir.

Q Have you spoken to Warren Sinsheimer since June 9, 1970?

A Yes.

Q Do you recall on what occasion?

A I called him, I believe, in August or September.

Q Of 1970?

A Yes.

Q What was the purpose of that telephone call?

A To try to set up a date to meet him.

Q During that telephone conversation did you discuss the assumption of management control?

A No, sir.

Q During that telephone conversation did you tell Warren Sinsheimer that he had assumed management control in violation of the contract?

A No, I tried to set up a date to meet with him.

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conversation of any of the things that have become issues in this lawsuit?

A That is correct.

xx (Defendant's Exhibit AL marked for identification.)

Q Mr. Kovar, I show you Defendant's Exhibit AL for identification and I ask you if you can identify that document?

A It's a copy of the termination agreement, my termination agreement.

Q Did you have any written employment agreement with ISL or Plessey following the closing on March 2nd?

A No, sir.

Q In connection with your termination did Plessey agree to confer certain benefits on you?

A Plessey agreed to pay me six months' compensation.

Q Six months' salary?

A Yes.

Q Did Plessey have any legal obligation to pay you that six months' salary?

A Yes.

Q Based upon what?

A Upon the English common law that managerial employ is not employed at will, as is the case in the

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United States, but that a reasonable notice period must be given, the length of which notice is dependent upon the type of position involved, there being an English case in which the editor of a newspaper was held to be entitled to three years' advance notice.

Q Now, in addition to paying you the six months' compensation did Plessey give you any other benefits?

A They agreed to allow me to stay on at the house in Barbados until the end of November rent-free and agreed to allow me to continue the use of the company car I had during that period of time. Upon early leaving of Barbados for the States, the house and car to return, of course, to Plessey.

Q Was the agreement which you made with Plessey Incorporated reduced to writing in this document dated June 16, 1970?

A That is right.

MR. MALONEY: I offer it in evidence.

THE COURT: Who signed that agreement?

THE WITNESS: That was Mr. Sinsheimer's signature.

THE COURT: Sinsheimer?

THE WITNESS: I think. Let me double-check. Yes.

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THE COURT: It will be received.

xx (Defendant's Exhibit AL received in evidence.)

THE COURT: I think we might recess for the day. Would that be convenient?

MR. MALONEY: Yes.

THE COURT: Ladies and gentlemen, we will reconvene tomorrow morning at 10 o'clock. Please don't discuss the case with anyone in the meantime. Thank you very much. I hope you all have a nice evening.

(Whereupon, an adjournment was taken to March 12, 1974, at 10.00 A.M.)

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SCIENTIFIC HOLDING COMPANY, LTD.
v.
PLESSEY INCORPORATED

March 12, 1974,
10 A.M.

--

(Jury present.)

THE COURT: Good morning, ladies and gentlemen. Nice to see you this morning.

MR. McCONNELL: Your Honor, Mr. Maloney has agreed with me that we can interrupt the examination of Mr. Kovar and put Mr. Carlen on the stand so that we can get him on and off.

THE COURT: All right. I think if counsel agree to that, it will give the jury and I a change of pace and we will go along with that.

All right, go ahead.

MR. McCONNELL: Mr. Carlen, will you step up, please.

R A Y M O N D N. C A R L E N, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McCONNELL:

Q [illegible]

A I live in Hinsdale, Illinois, a suburb of Chicago.

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Q What is your job or occupation?

A I am the president of Joseph T. Ryerson & Son, Inc.

Q Where is that company located?

A They are headquartered in Chicago.

THE COURT: What does that company do, sir?

THE WITNESS: Well, we are steel, aluminum, metals, distribution and processing.

Q Did you have some connection with the company called International Scientific Limited or ISL?

A Yes, I was a shareholder and a director of ISL.

Q Are you presently a director of the successor company, Scientific Holding Company, SHC?

A Yes, sir.

THE COURT: That, I take it, is the plaintiff in this case?

MR. McCONNELL: That's correct, your Honor.

Q I show you what has been identified as Plaintiff's Exhibit 9, which purports to be a copy of the ndice to the shareholders for the special shareholder meeting of ISL to be held February 14, 1970, and ask you if you had occasion to review that document at or about the time it was sent to the ISL shareholders?

A Yes, sir, I received that as a shareholder and

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did review it.

MR. McCONNELL: I offer Plaintiff's Exhibit 9 in evidence, your Honor.

THE COURT: Any objection?

MR. MALONEY: Your Honor, I would object at this time on the ground that this document was apparently not given to the defendant at or before the closing in this transaction and, therefore, I don't see what relevance it has to the issues in this action.

MR. McCONNELL: There is testimony that it was indeed given to them.

THE COURT: Let me see it.

(Pause)

THE COURT: Let me see counsel a minute.

(At the side bar.)

THE COURT: What is your objection to this?

MR. MALONEY: Our objection is, your Honor, that based on our witness' recollections, they were never shown a copy of this document or given a copy of it prior to the closing on March 2nd.

I think Mr. McConnell could renew his offer at such time as he does produce evidence to the contrary.

THE COURT: I think I will receive this subject to connection. If he can't show that, you can make a motion

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to strike it.

MR. MALONEY: Your Honor, would you explain to the jury at this time that this does not mean that the defendant knew what was in this document based on anything we have had so far.

THE COURT: All right.

MR. MALONEY: Thank you, your Honor.

(In open court.)

xx (Plaintiff's Exhibit 9 received in evidence.)

THE COURT: Ladies and gentlemen of the jury, I am receiving Plaintiff's Exhibit 9 at this time subject to connection. There has been no evidence so far that the defendants knew anything about this document. There may be further proof in that connection and for that reason I am receiving it now subject to that further evidence that the defendants knew about this document.

All right.

BY MR. McCONNELL:

Q Directing your attention, Mr. Carlen, to the third page thereof of Plaintiff's Exhibit 9, which is headed "Proposal for sale of assets of the company," did the first two paragraphs thereof accurately describe the contract with Blessow as you understood it?

A Yes, Mr. McConnell, it certainly does.

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MR. McCONNELL: At this time, your Honor, I ask leave to read those two paragraphs to the jury.

THE COURT: All right.

(Mr. McConnell read from Plaintiff's Exhibit 9 in evidence to the jury.)

Q I show you what is in evidence as Plaintiff's Exhibit 26, which is Mr. Sinsheimer's letter to International Scientific Limited, under date of June 9th, and ask you if you received a copy of that letter as a director of ISL on or about that date?

A Yes, I did receive this letter, a copy of it.

MR. McCONNELL: Without reading the letter again, your Honor, that is the letter where Mr. Sinsheimer says Plessey is assuming management responsibility pursuant to the March 2nd contract and the amendment, is that right?

THE WITNESS: Yes, and this was rather a surprise to me.

Q What did you do as a director of ISL following receipt of Mr. Sinsheimer's letter?

A Well, I couldn't understand the letter basically because it didn't correspond with my understanding of the agreement and so I immediately contacted Allan, attempted to contact various other members of the board of directors and had a number of discussions with them because, as I

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say, I was perplexed. The letter really was a shock to me because it didn't match with what I understood the agreement was.

Q Did you also have some conversations with your attorneys?

A I had some conversations with my personal attorneys after I had discovered that there had evidently been a change at closing, which I didn't understand or know about.

Q Did you have any discussions with either Mr. Lewis or Mr. Shapiro with reference to this letter?

A Yes, with both of them.

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Q I show you what has been marked Plaintiff's Exhibit 27 and ask you if you can state what that is?

A Well, that is a letter from myself to Mr. Sinsheimer. It was a result of all of these discussions as to the approach to this letter, my inquiry as to how it came about, exactly what changes had taken place, so this would occur and this letter would be written, which completely shocked me.

Q What is the date of your letter?

A The date of my letter to Mr. Sinsheimer is June 17.

Q Did you cause this to be sent to Mr. Sinsheimer on or about that date?

A Yes. As I said, we had a number of discussions as to the way to go about this unusual take-over or this letter of June 9 of Mr. Sinsheimer with Julius Lewis, with Harold Shapiro, with the directors as to what action we should take, Mr. McConnell.

Q Did they assist you in the drafting of this letter?

A Yes, quite obviously as a result of those discussions we felt that it would be better if I tried to meet with Mr. Sinsheimer, and I did respond to the letter in an effort to communicate with him as to this action, and as

I stated in the letter, I took certain position in

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him, and this was the result of all of these discussions, and it was thought that I should try to meet with Mr. Sinsheimer to write him stating these points, and then subsequently to meet with him to resolve the issues involved, because I was quite upset.

MR. McCONNELL: I offer Plaintiff's Exhibit 27 in evidence.

MR. MALONEY: No objection.

THE COURT: It will be received.

xx (Plaintiff's Exhibit 27 received in evidence.)

Q Would you read your letter to Mr. Sinsheimer to the Court and jury, please?

2 A "On behalf of the Directors of Scientific Holding Company, Ltd., I wish to acknowledge receipt of your letter to them of June 9, 1970, concerning your assumption of complete management control of International Scientific (1970) Limited.

"I have discussed this action with four of the Directors and two of the shareholders, and they are greatly distressed. They believe that the progress of ISL through May, 1970, clearly indicated that the profit goal set for the Company under the Agreement of February 2, 1970 (as amended) would be met.

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"In our negotiations you repeatedly indicated that no such action would be taken so long as progress was being made by ISL. You have now seen fit to assume management, despite your contrary assurances.

"The Directors will look to Plessey Incorporated as trustee of the rights of Scientific Holding Co. under the February 2 agreement. The Directors know and will expect that the good faith management of ISL by Plessey Incorporated will entail the production of the maximum profit available during the 12-month period ending March 31, 1971. To this end the Directors have the confidence and will expet that you will make available to them a complete monthly accounting of all ISL activites, sales, expenses and such other information as may be necessary or desirable for them to determine whether, in their opinion, any course of action or expense is detrimental to attaining the profit goal.

"In my experience as a Director of Inland Steel Company and of Joseph T. Ryerson & Son, Inc., as well as other companies, and as an officer of Ryerson I have many times been involved in the acquisition of companies over the past 16 years. Such involvement

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administration of the acquired company as a unit of Joseph T. Ryerson. On a personal basis and as a private invester, I have been involved with a number of smaller companies that have been sold to or merged into other corporations. Based upon these many experiences it's my belief that you have assumed an awesome responsibility.

"In the best interests of your fine Company whose calibre is beyond question (one of my close personal friends discussed Plessey with me during our negotiations -- you may remember Frank Kepple who told me that one of his many varied interests had been sold to you) and, as well, in the interests of the shareholders of Scientific Holding Ltd.; I believe that I, along Mr. Victor Johnson - a shareholder, Director of Scientific Holding Company, Ltd., and Vice President of Operations of American Sugar - should meet with you and your associates. Such meeting can take place at our mutual convenience as quickly as possible in the future - either in New York at your offices, or at mine in Chicago. At such a meeting we can discuss the complexities of your trusteeship over the next 10 months and the solution

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"Please let me hear from you.

"Sincerely,

"Raymond N. Carlen
President."

Q Did Mr. Sinsheimer respond to that letter?

A Yes, he did.

Q I show you what has been marked Plaintiff's Exhibit 28 and ask you if that is Mr. Sinsheimer's response?

A Yes, that is Mr. Sinsheimer's response.

Q Did you receive that on or about the date it bears?

A Yes, on or about the 24th of June, something like that.

MR. McCONNELL: I offer Plaintiff's Exhibit 28 in evidence without admission to the assertions made therein.

MR. MALONEY: No objection.

xx (Plaintiff's Exhibit 28 received in evidence.)

MR. McCONNELL: At this time I would like to read Plaintiff's Exhibit 28 to the jury.

(Mr. McConnell read from Plaintiff's Exhibit 28 to the jury.)

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Q Now, after the receipt of Mr. Sinsheimer's letter of June 22, what, if anything, did you try to do to meet with Mr. Sinsheimer?

A Well, I immediately related to those directors available to me on the phone and with counsel Julius Lewis and Harold Shapiro, one or the other of them, the contents of this reply, and the sum of those discussions, since Shapiro and Lewis were involved with the draft of the letter, and our general approach was a joint discussion amongst the directors overthe phone, that I pursue Mr. Sinsheimer, and I felt very strongly that I had to meet with this man and discuss with him this transaction, and that it would serve the best interests of all involved if I did that.

So I continued to try to reach Mr. Sinsheimer on the phone, succeeded, and we established a date in New York in Mr. Sinsheimer's office.

Mr. Johnson, Victor Johnson, of the American Sugar Company, one of the other directors, lived in New York and worked here, but couldn't make it that day. So Harold Shapiro, counsel, came with me to the meeting.

Q Can you fix the date of that meeting?

A That was on Monday, July 13.

Q Where did it take place in New York?

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Q Who was present besides yourself and Mr. Shapiro?

A Just Mr. Sinsheimer in his office -- I presume it was his office; it was a law office. His name was on the door.

Q Now, would you relate as best you recall to the Court and jury what was said by you and what was said by Mr. Sinsheimer at that July 13 meeting?

A Well, it was a general discussion of this take-over, to which I objected, and I said that I had just learned after I received his letter that there had evidently been an amendment which charged things, which I had not known about, which I didn't believe was proper, and at that moment I had no specific ruling or legal knowledge myself as to whether or not it was, but it seemed as a layman, and in all of the discussions in these kind of things that I have been involved in, it seemed wrong.

Mr. Sinsheimer said he didn't think it was. I went on to say that, again, in my experience I would not want to be in his shoes, that he had, in fact, taken on an awesome responsibility, and, quite obviously, we would need detailed records. We, I felt, had the right to do this. Mr. Sinsheimer denied that he would give me or anyone else; it may have been at this point in the

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over the phone and I will give you theresults." But, at any rate, at this point in the conversation he turned and picked up the telephone and talked with someone. And I don't know who that was. I presumed at that moment sitting there with Mr. Sinsheimer that it was his comptroller or someone who had their financial figures, and listening to one side of the conversation they were talking about the profit plan, the budget for ISL for the next year of Plessey, and I heard them talk about their year, which, I believe, ran from June to June -- that was their accounting year. And, of course, our measuring year went from April 1st to March 31st.

And there was some discussion about the adjustment of their profit numbers to ours, and Mr. Sinsheimer concluded that conversation, hung up the phone, and turned to me and he said, "Mr. Carlen, there is nothing to worry about. We are going to make more than the $360,000."

And I was rather surprised and amazed, and I said, "That is wonderful, Mr. Sinsheimer. Next April when you get the accounting figures, why, you bring the check to Chicago and I will buy the champagne and we will have a party for all of the shareholders of ISL."

We then discussed again my feeling that, you know, this was an awesome responsibility in my opinion

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a tremendous one Plessey had taken on, because, again, in my business involvement with many companies I wouldn't take on this responsibility in any transactions we have been involved in, and have not.

The problems of accountants in my company, some of them can't agree on numbers, and the possible problems involved here were awesome.

Mr. Sinsheimer rejected again my request for operating statistics and monthly data, and then I think it was a repeat of this, and then Mr. Shapiro and I left.

Q Following that meeting did you prepare a memorandum of the conversations that you had with Mr. Sinsheimer?

A Yes, I did.

Q I show you what has been marked Plaintiff's Exhibit 29 and ask you if you can identify that?

A Yes.

Q And in the same connection, Plaintiff's Exhibit 30?

A These are the notes I made.

THE COURT: Which is it? The handwritten one?

THE WITNESS: The handwritten one.

THE COURT: When did you write those up, sir?

THE WITNESS: Well, I started in the cab when we

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got out, because I have long found it a practice after any business meeting that I try to make notes of those important meetings so that I may have them for the file. And, of course, I knew that it would be much better that I begin to write these immediately.

The other directors and people involved in ISL would obviously want to know what took place, so I made these notes, completed them at the airport. The middle of the first page, I guess, gets more clear, for the cab would not stop jiggling around. But, at any rate, that was about the time frame.

And then the other one is my secretary's typing of this.

THE COURT: The typewritten one is a copy of the handwritten notes?

THE WITNESS: I don't know, your Honor, if they are exact duplicates, because my secretary had worked for me at that time 21 years and she takes --

THE COURT: She takes liberties?

THE WITNESS: She improves upon my grammatical inaccuracies.

MR. MALONEY: Your Honor, we have no problem about that. We don't intend to object to the introduction of these pieces of paper, but we do not admit that they

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are necessarily an accurate transcription of the conversation. However, we have no objection to the two pieces of paper.

THE COURT: You are offering 29 and 30?

MR. McCONNELL: We offer 29 and 30.

xx (Plaintiff's Exhibits 29 and 30 received in evidence.)

Q Will you read to the Court and jury at this time Plaintiff's Exhibit 30, the typed copy?

A The typed copy you wish me to read?

Q If you can read your own handwriting, read 29.

A Meeting between Messrs. Shapiro, Sinsheimer and Carlen in New York offices, July 13, 1970, started at 4.35 p.m. New York Daylight Saving Time.

"Discussed reputation of Plessey as fine company. Questioned relationships with Frank Keppel. Sinsheimer finally remembered firm of Dunbar, Keppel & Plessey entering into franchise deal with them. Sinsheimer had met Keppel.

"Sinsheimer opened conversation - apologized for 'curt' letter. He didn't mean to have it sound that way. Sinsheimer had just read over his letter to me dated June 22, 1970, before we arrived and said it was 'curt' - I said, 'Yes, it was very curt.'

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"Sinsheimer said your (Ray Carlen's) letter was friendly and 'extremely articulate' but he, Sinsheimer, had to reject any trusteeship.

"Started to tell how Kovar was not accepting any of their suggestions, and he called Kovar a stubborn man (this last comment after shutting door to his office).

"I said I was not interested in his relationship with Kovar but would rather discuss the rights of ISL shareholders under the agreement and the necessity of SHC (ISL) directors receiving figures. Sinsheimer rejected this and said in his opinion we had no right to receive such figures. I disagreed.

"Sinsheimer remarked he didn't think it was going to be any problem because ISL was going to make more than $360,000, thus Plessey would be paying full amount $1,260,000 in April, 1971. Sinsheimer's obligation was only to run Plessey in good faith and that fulfilled it (He said his associates informed him when he took over that that was his only requirement).

"I counteredwith specifics - still to be met and read from page 7-A, principles, et cetera, et cetera, points A, B, C, et cetera."

THE COURT: What does that mean, "read from page 7-A"?

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THE WITNESS: Well, those were a group of notes of the negotiations and agreement as I remember it, your Honor, that I had in front of me.

MR. MALONEY: If I can help out, that might be page 7-A of the agreement signed on February 4, in which certain principles setting forth the accounting treatment were set out.

THE COURT: Would you agree to that?

THE WITNESS: Yes, I think so.

THE COURT: I want the jury and myself to understand what it meant.

THE WITNESS: (Continuing) "Sinsheimer agreed that this was true, and I told him that I must really investigate monthly figures for ISL to reach knowledge of make-up and progress.

"Sinsheimer said only if they didn't make $360,000 would this be a point of contention and that he fully understood that when he took over management (exercised his right by letter dated June 9, 1970). That if he didn't make and didn't pay our $1,260,000 he would face us in a court.

"Shapiro entered conversation and reieterated what Sinsheimer had said.

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"Shapiro said this was the first time pre-trial conference had been held before litigation was entered into.

"With this agreed to, I repeated rights of shareholders to get figures. Sinsheimer rejected completely. I said he'd have to bring these kinds of reports and accounting justification into court - if required after end of measuring year and our case was presented before a judge or a master who was an expert in accounting."

THE COURT: I see we have a jury here who are experts in accounting.

THE WITNESS: I am going to ask them for help.

"Sinsheimer acknowledged this and repeated that he didn't think it necessary to furnish figures now or at some future date because they would make more than this by April 1, 1971.

"I asked did Sinsheimer have profit figures for June. Sinsheimer called someone on phone and asked if reports from Barbados were in. A five-minute conversation ensued on the phone. Sinsheimer said during this 'On their accounting basis they did make a profit in June.' He then asked on phone about profit plan (budget for ISL) - heard catches of discussion - nothing of meaning.

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1970, to June, 1971, called for $605,000 or $620,000' after full management and Plessey expenses were charged - so on our measuring basis, this was over $900,000. Sinsheimer guessed on our basis, measuring year's April, 1970, to April, 1971, profits should be $500,000/ $600,000. I thanked him for that confidence and invited him to Chicago for delivery of the check and I'd bring the wine.

"I again queried - shouln't you recognize our right and get accounting figures? He said he wasn't going to run extra set of figures, and I should call him monthly and he'll give me figures over phone.

"We shook hands and left at 5.10 p.m., New York Daylight Saving Time."

Q Now, did you subsequently write a letter to the shareholders of SHC advising them of the takeover and of your conversation with Mr. Sinsheimer?

A Yes, I did. I discussed this againwith counsel, my counsel, and with Shapiro and Lewis and other directors. I did this, Mr. McConnell, as an individual because of the many shareholders who were friends of mine who had invested in this tiny company struggling to keep it going and to try to preserve it as a part of the free enterprise system.

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THE WITNESS: I couldn't tell you exactly, your Honor, but I think there were nine or ten of my friends, perhaps more. I can quickly recall eight or nine of them.

Q I show you what has been marked Plaintiff's Exhibit 31 and ask you if you can identify that?

A Yes, Mr. McConnell. This is, I believe, the final copy that eventually went to the shareholders dated August 11.

MR. McCONNELL: I offer 31 in evidence, your Honor.

MR. MALONEY: I would have the same objection to this document as the proxy material.

THE COURT: I will take it subject to connection.

MR. MALONEY: Perhaps Mr. McConnell could ask Mr. Carlen if he sent a copy of this to Plessey.

THE COURT: Or whether theygot a copy of it.

MR. McCONNELL: There is no contention that they did. It is a contemporaneous recording.

THE COURT: I don't think it adds anything to that. We have already received the notes he made at the meeting. I don't think this adds much to that.

MR. MALONEY: Then I would renew my objection as to the receipt of this document since it was never sent

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THE COURT: I think I will sustain it. We have the minutes.

MR. McCONNELL: I don't contend it was ever sent, but I have no information that it was not.

THE COURT: He said he reported on the conversation to the shareholders. I think that is enough, and I will sustain the objection.

MR. MALONEY: Thank you, your Honor.

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eoh 1 Carlen-cross

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MR. McCONNELL: You may cross.

MR. MALONEY: May we take a five-minute recess, if your Honor please?

THE COURT: All right, we will take a five-minute recess.

(Recess.)

(In open court; jury present.)

THE COURT: All right, Mr. Maloney.

CROSS EXAMINATION

BY MR. MALONEY:

Q Good morning, Mr. Carlen.

A Good morning, Mr. Maloney.

Q Mr. Carlen, do you recall how the subject of who would manage the business, if Plessey acquired it, first came to your attention?

A I don't quite understand your question, Mr. Maloney?

Q When did you first learn that Plessey, Inc. was interested in acquiring the business?

A I believe some time in December, 1969. I would have to refer to my notes to be exact, but about then. We had gone through a group of various companies. You know, this was a poor little company that had no money and we had agreed that to maintain the employees in

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Barbados, we had built a skilled work force, since the investors had no more money, we would have to sell the company and that decision was reached in August of 1969 and we discussed with a number of different companies and then Plessey came on the scene somewhere about December, 1969, and things were a little desperate at that point.

Q So, you had been trying to sell the company since August of 1969; is that correct?

A Yes, Mr. Maloney. The investors had no more funds to put in and it was a shame to have a fine company like this not continue in business. We had almost 400, I believe, trained employees and it was providing a good service for the industry and with the credit crunch in 1969 I was talking to our Toronto bank at least once a week about the funds. Business activity was restricted because of our lack of money to finance our inventory and receivables, which had grown at phenomenal bounds, so it was just in the best interests of the employees and everyone concerned that it be acquired by someone who had financial resources to keep it going so the employees, the customers and all involved weren't hurt.

Q By December of 1969 or January of 1970 was anyone other than Plessey interested in acquiring the company?

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A I can't rightfully answer that, Mr. Maloney. I stopped my efforts when I was informed that there had been discussions, that Plessey had an interest, that it looked like they were going ahead and about that time in January a directors' meeting was called in New York, January 30th I believe, to discuss the basis of the negotiations that counsel and Mr. Kovar had been conducting.

Q Between August, 1969, and January, 1970, had you reached the stage in negotiations with any other group to acquire the company that had resulted in a written contract or proposed contract?

A Well, there was one of those companies, Data 100 I believe was the name of it.

Q Yes, sir; any others that ever got to the stage of a draft contract or letter of intent?

A That I am not aware of. I had had personal discussions with a venture capital group of people who supply money in Chicago, but that had not reached any point where counsel was even involved in it. Those were just discussions of mine as to their interest.

I had had, personally again, two telephone calls with the financial officer at Control Data Corporation and I had one visit in my office from a representative of Data 100.

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Q By January, 1970, was Data 100 any longer interested in acquiring the company?

A No, I believe they had terminated their interest at some time prior to January, but again, Mr. Maloney, I don't know the exact date.

Q All right. Now, in connection with the proposed acquisition of the company by Plessey, when did it first come to your attention that the parties were having difficulty in agreeing on who should manage the business during the measuring year?

A That the companies were having a difference--

MR. MALONEY: Let me withdraw that question. Perhaps I will ask a few other questions.

Q When for the first time did someone explain the terms and conditions on which Plessey was proposing to acquire the business?

A There were one or two telephone calls and then the first time that I was involved in the discussion of what we should agree to was at the January 30th board meeting, which was in my hotel room in New York.

Q Prior to January 30th, do you recall any discussion with Mr. Kovar or with any of the other directors concerning who would manage the business if Plessey acquired it?

A To my knowledge, Mr. Maloney, I had none because

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my attitude was that this was -- ISL was a going vibrant company and all it needed was money and that it represented a value to anyone who could acquire it. So that my attitude was it was a going business and you purchased that. I do remember with either Mr. Shapiro or Mr. Kovar a discussion in regard to Plessey in which I said that I presumed they would give us Plessey shares in exchange for our shares and buy it as a going company for the value ofthat going company to Plessey.

When I buy a company, we are negotiating for one right now, it has a going value to me and I am willing to pay for it.

Q When you acquire that company, you normally have a right to decide whether or not its present management remains; is that correct?

A Well, it all depends on the agreement that you enter into when you negotiate. I acquired one in 1969, I believe, when Mr. Gantz, the owner from whom we acquired it, was left as the general manager for two years because it was in our best interests and his. So, it depends on the negotiation.

Q If there is nothing in the contract giving the present management a right to remain with the company, the new owner has a right to put his own management in

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there; is that correct?

A It depends upon the agreement, Mr. Maloney.

THE COURT: I think his question presupposes that the contract doesn't say anything about it. You are acquiring a business as of April 1st, the contract says nothing about management, I suppose under those circumstances the purchaser would have the decision after April 1st as to who was going to run the business?

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THE WITNESS: I would presume that in the absence of it, your Honor.

THE COURT: That is all he is asking.

THE WITNESS: But in all of my experience that subject has always been treated in the agreement and never left absent because --

THE COURT: Have you ever had a case where somebody wanted to sell you a business and run?

THE WITNESS: Pardon?

THE COURT: Somebody wanted to sell you a business because they wanted to get out of it?

THE WITNESS: Yes.

THE COURT: Sure, it is all a practical problem.

THE WITNESS: Yes, sir, but in each of those cases, then, I like to have a clause in there that says what will happen to him in consideration for us purchasing

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his business. At Ryerson I would not like him the next day to open a competing company across the street so I must say in all of those that I have dealt with there has always been something to the effect of that. It depends upon the agreement.

Q When for the first time did you discuss with Mr. Kovar or with any of the other directors what the provisions in the Plessey agreement would be concerning management?

A We discussed that at the board meeting on January 30th when the stage of the negotiations were disclosed to me and I was not very pleased with it because I again reiterated to my associate directors that the company has a going value, you have got all of these trained people out there working and it should have a value to Plessey and they should be willing to pay us either in shares or in money for this business.

Q Do I understand, Mr. Carlen, that you didn't like this payout arrangement; you wanted Plessey to pay the money right away?

A Absolutely. I disliked it. They are bad in my opinion agreements. They are difficult to monitor.

I talked about the accounting problems at the board meeting, but again you have here a company whose

investors have no more money. You have got all of the people working doing a good thing, serving the economy and, you know, we have to agree to this. This is the form in which the negotiations have come.

Q What was the value of the business as a going concern to Plessey, Mr. Carlen?

A Mr. Maloney, you are asking me for an opinion as a businessman and only the management of Plessey can answer that.

I can give you an example of the company we are now acquiring.

Q Let me try another question and maybe we can narrow it down.

A May I finish my answer?

Q Go right ahead.

A We are now looking at a company to acquire and last year it lost about a million dollars. The year before it lost three or four hundred thousand dollars and this company, to me, it is an old company, it has an honored name where it is, it is established in an area where we do not have a plan and I have just told my negotiators that they may negotiate up to $3,000,000 as its value to Ryerson.

Q Getting back to ISL, though, I think you have

mentioned things like trained employees and a plant, but in addition for the business to have value as a going concern, didn't it also have to have potential customers and written purchase orders for sales? Isn't that another thing that you would consider in deciding whether or not to make an acquisition of a business?

A Well, they had many established customers. They had people with whom we were doing business. They had a good order book at that moment in time.

As a matter of fact, our only problem was money. As I said, I was talking to our suppliers at Ampex, I was talking to the bank and Mr. Kovar was calling me saying that this company wishes to give us additional business.

I said, "Allan,for God's sake, we've no money to handle the receivables and the inventory. We cannot take any additional business."

Q Did you have personaly knowledge of the order book for ISL or did you obtain that information from Mr. Kovar?

A I obtained it all from Mr. Kovar.

Q So you had no personal knowledge of what the orders on the books were?

A I had no personal knowledge except some discussions with Mr. Tucker, two telephone conversations with a Mr.

Grey, I believe,, who worked with Mr. Tucker in the Chicago area.

I had introduced Mr. Kovar to two or three customers so I was familiar to that extent and then the reports of the directors as to our order book at that moment in time, but I kept no weekly or monthly records.

Q What was your understanding of how the payout formula would work?

A Well, when I left the directors' meeting my understanding was essentially as it was submitted to the shareholders in the proxy document.

Q To be more specific, did you understand the relationship of future profits to the amount of money that you could expect to receive at the end of the measuring year?

A Quite obviously I did. My discussion with Mr. Sinsheimer covered that adequately.

Q You hadn't spoken to Mr. Sinsheimer by January 30th, had you?

A No, I meant my previous testimony I had stated that.

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Q I am sorry, I didn't mean to confuse you, but on January 30th, when you were at the board meeting, what was your understanding on that day of the relationship

between profits and the amount of money which you could expect to receive at the end of the measuring year?

A My understanding specifically was essentially as it is in the proxy statement to the shareholders, that is, there was a financial down payment, the investment of the funds by Plessey keep the thing going and I was most interested that that had to be done to keep these employees working and to keep it as a good solid viable company and then, if we made over the measuring year the $360,000, the additional payment of $1,260,000, I believe, and that the turnaround of the company and, quite obviously, the way we had been operating without any money and you scramble to meet a payroll and you dig and you scratch and you talk to the bankers and try to keep things going so that we could pay off the Ampex, we could pay off EMI, I believe, was our other supplier that we owed, so that we could get funds to handle the receivables, so that we could repay our debts, it would take two or three months to turn this around.

The agreement provided for an allowance of that and then my concept of the agreement was that once the company was turned around, it was April and May and starting in June, the third month after the beginning of the year, that the profits from then on would average the $15,000.

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Q On June 30th had Plessey and ISL reached agreement on a specific management control provision that had been written down by someone?

A On January 30th, you mean?

Q Yes, at the board meeting. While you were at the board meeting did you see in writing the management control provision which was to be inserted in the final agreement?

A I saw all of the provisions, again I say, and approved as a director submitting to the shareholders that which went in the proxy statement which went to the shareholders, Mr. Maloney. My remembrance and understanding of that was that if we had three months of losses after the first two months, the turnaround period, then they would be able to take over the management of the company and also if in June, July and August, some period of months, and my concept of that areement of that moment in time was that it ran a number of months after June. Quite obviously, again, I am prejudiced by my perspective.

If I acquired a business on this basis, heaven forbid, and they made $8,000 in June, 12,000 in July and 20,000 in August, I would think that they were doing a good job and I would leave them alone and hope they make 50,000 by December.

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Q Was there a draft agreement presented to you at the board of directors' meeting on January 30th?

A Yes, sir.

Q I show you Defendant's Exhibit K in evidence and ask you if you can identify that as the draft of the contract which the directors discussed on January 30th?

A Do you want me to go through this whole darn thing?

Q In the corner we have established --

A I will turn to counsel and ask him if this is something that I have seen before.

MR. McCONNELL: Exhibit K, I think, is the same as Plaintiff's Exhibit 2, that is the second draft of the agreement, and we will agree that that was a draft discussed at the board meeting and what changes were to be negotiated in that draft.

MR. MALONEY: All right.

Q Defendant's Exhibit K is Mr. Kovar's personal copy on which he made some notes.

A He made the notes; fine, thank you.

Q On January 30th at the board meeting.

A I can say that this is the one that I saw Mr. Kovar kept the notes of the discussion, presumably.

Q Did someone give you your own copy of the draft

at the meeting, Mr. Carlen?

A Yes, I believe so, Mr. Maloney.

Q Did you make any notes on your copy of the draft?

A I don't remember. Again, I went through my notes of all of these and I have no personal memory of what I did with it. I don't believe that I made any notes or kept the copy, as a matter of fact, but I am not sure.

Q You cannot find your copy of the draft that you had at the meeting on January 30th? You have not been able to locate it?

A That is my presumption at this moment, right,sir.

Q Would you turn to page 5 of Defendant's Exhibit K, Mr. Carlen.

A Yes, sir.

Q There is a paragraph 5D there, which we all agree relates to the management control issue. I ask you if that provision correctly expressed understanding of the management control provision as you understood it on January 30, 1970?

MR. McCONNELL: I object.

MR. MALONEY: I object to Mr. McConnell, the witness has not indicated that he has any failure of recollection or that he doesn't understand the question. I don't think we should have any prompting at this point.

MR. McCONNELL: I object to that comment, too, your Honor.

THE COURT: Please, gentlemen, let's not have a conversation. I will let the witness look and whatever this is, page 5, is it?

MR. MALONEY: Yes, your Honor.

THE WITNESS: We are talking about 5B?

THE COURT: 5D and I will ask the witness if the draft that he saw at this meeting, whether reading this clause indicates to him that that was the clause that was discussed at the meeting?

A Mr. Maloney, this is the paragraph to which I took violent exception. If this is a draft which was presented at the January 30th directors' meeting, I held forth at great length and it was my understanding that the words here "15,000 per month in any full months" was something I could never buy.

I said, "You're lucky enough to turn this around in two months."

I went through at that directors' meeting the exposition with the money in there it would be a growing, profitable business and you had to look to the average months ahead for profit.

Q What did you understand the amount of time you

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would have under the provision in the draft agreement? When under the language in the draft, when would the company would have to make $15,000 in order to remain in management control?

A In my opinion it was stated as in the proxy statement and that is the way we left. That was my opinion.

THE COURT: At the time of the meeting, I think the question is, at the time of the directors' meeting when counsel stipulated this was the draft that was before the meeting and when you commented on paragraph 5D, as you just testified, I think the only question is taking 5D as it was presented to the meeting, how did you interpret that next to the last sentence of 5D?

b4 THE WITNESS: "Notwithstanding the foregoing.."

THE COURT: Yes, that is right.

THE WITNESS: I totally objected to it.

THE COURT: I know you object to it, but what did it mean to you? I think that is the question, what did it mean to you?

THE WITNESS: This comemt meant to me, as I then read it, $15,000 in any full months commencing with the third calendar month of the measuring year.

THE COURT: Which would have been what, June?

THE WITNESS: Well, it depended upon the day

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of the closing. Mr. Maloney asked me what my feelings were about this on January 30th and all I can say--

THE COURT: No, but all he is asking you now is that you understood if they didn't make $15,000 in the third month of the measuring year, that Plessey could take over? Is that what it meant to you?

THE WITNESS: Well, when this was presented to me, that is why I reacted violently against it, your Honor--

THE COURT: That is what it meant to you?

THE WITNESS: Yes. Then I said, no way, little Nell, this is impossible.

THE COURT: All he is asking you is what it meant to you and that is what it meant to you and you objected to it?

THE WITNESS: Yes.

THE COURT: All right.

Q Staying again with this paragraph for one more question, if the closing took place on March 2nd, as it did, in fact, do, what was the first month in which ISL would have to make $15,000 under the language that is written in the second draft?

A Mr. Maloney, I was violently opposed to this at the directors' meeting.

THE COURT: He is asking you a hypothetical

question, I think, now. I suppose it would depend upon the measuring year, would it not?

MR. MALONEY: Yes, your Honor.

THE COURT: If you tell him what the measuring year is and ask him to tell you what the third month is, he can answer the question.

Q If the measuring year commenced on April 1st, Mr. Carlen, what would be the month in which ISL would have to make $15,000 profit in order to remain in control?

A Well, Mr. Maloney, I don't know why you want to ask me this question because it is in my opinion pointless. I am, unfortunately, totally opposed to this form of agreement. If you want to say what was proposed here --

THE COURT: The jury and I know you are completely opposed to it. He is just asking you a simple question.

THE WITNESS: If this was the agreement, as it was closed on March 2nd, the first month of the measuring year is April, the second month is May and then June is the third month, obviously, and, as I read this through the comma, you would then have to make $15,000 in June and that is impossible in this company.

Q Now, you violently objected to it and could you tell us the substance of the discussion that followed in connection with how this provision should be changed?

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A Well, I still felt it had going value and that Plessey should be willing to exchange shares, if they didn't want to lay out the money, and that was the initial position that I took. That it should be an exchange of shares --

Q Mr. Kovar explained to you that Plessey was just not going to do that, isn't that correct, Mr. Carlen?

A I am not sure whether that was a fact before then. I know that there were discussions between Mr. Kovar and Mr. Lewis about shares and I don't know exactly when shares went out the window and it may well have been at the January 30th meeting that it was for cash, but I still took my position, can't you, you know, exchange shares? This has a going value to them. Can't they just pay us and let's forget all of this stuff?

No, we can't. Mr. Kovar explained that; counsel explained it. The gun isat our head. We have to keep this going. They are willing to do these things.

I then took the position that, you know, okay, we need a period of time to turn this around and the discuss then took place of the period of time to turn it around once the money was in there, the finest management in the world needs this to pay off all of these statements and keep people working.

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We had no way to buy materials, we didn't have any money. We were so in debt that the minute we had this money we could have more materials in and then we could ship them out and make a profit, so given that two months and then I said, in the subsequent months we'd have to have an average provision.

Q Now, Mr. Carlen, you just said in your testimony that the gun was at your head on January 30th. What was that that you were referring to?

A Mr. Kovar said that, I said.

Q Mr. Kovar said the gun --

THE COURT: I think all you are talking about is that you were short of cash and didn't have the working capital. That is the gun you are referring to?

THE WITNESS: I can make that statement--

THE COURT: Isn't that what you are referring to?

THE WITNESS: Yes, sir.

THE COURT: It was the financial condition of the company, the last of working capital that you referred to as the gun at your head?

THE WITNESS: Yes, sir. I had been talking with the bank weekly in Toronto to whom we owed money. There were other indebtednesses and I explained --

Q Was one of those other indebtednesses an

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indebtedness to Data 100 in the amount of $200,000?

A Yes, sir; I believe they had advanced $200,000 as part of their initial proposal to acquire ISL and I was aware of the fact that in the Plessey discussions this obligation would be taken care of.

Now, I believe and I am not accurate here, but I believe some of Mr. Johnson's, Victor Johnson's securities had been pledged against that loan or something.

Q That is not a problem. Do you know when the Data 100 loan had to be repaid?

A No, sir; I don't.

Q Do you know whether that loan had to be repaid prior to February 4, 1970?

A No, sir; I do not of my own knowledge.

Q After Mr. Kovar explained to you that there would have to be a payout provision, do you remember the substance of the discussion of how this language should be changed in order to give Mr. Kovar more time to make profits before Plessey could take over management control?

A Yes, Mr. Maloney. I believe I left that meeting with the opinion that the resolution was that they were to provide for a minimum, a minimum of two months, for the turnaround.

Q Which two months would those be, the first two

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months of the measuring year?

A This was January 30th and we didn't know when the closing date would be so we said, beginning the calendar month after the closing date, the first of the calendar month, so in this case, since it was closed on March 2nd, it would be April 1st and that a minimum of two months would be needed to turn it around. I didn't think that was enough so I said then, we have to provide an averaging provision over the next several months for $15,000 earnings.

Q Starting June 1st?

b5 A Right, the month of June; yes, sir.

Q Now, as of June 30th, as you sat there at the board meeting, did anyone tell you that Plessey had already agreed to make such a change or was this something tha would have to be further negotiated?

A I do not recall anyone telling me that Plessey had already agreed to any changes like that.

Q Whom did the board of directors instruct to continue the further negotiations with Plessey?

A Mr. Kovar, the president of the company.

Q Was he to be assisted by Mr. Lewis, one of your attorneys?

A Yes, I presume Mr. Lewis and Mr. Shapiro, one or the other. They were both involved.

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Q Mr. Carlen, do you remember that I deposed you under oath in Chicago on July 17, 1973, at Mr. McConnell's office?

A Yes, Mr. Maloney.

Q Do you recall being asked these questions --

THE COURT: Have you got the page?

MR. MALONEY: Page 18, your Honor.

Q Do you recall being asked these questions and giving these answers:

"Q At the January 31st meeting some decision was reached as to the type of provision that ISL would demand be included in the agreement, is that correct?

"A Yes, yes.

"Q What was the specific provision?

"A Well, the specific provision was basically that there would be three months and at the end of that three-month period the turnaround that I saw with the backlog and with the prices we had on the backlog and with the current operating costs of International Scientific Limited to earn a substantial profit, on that basis by June I had anticipated that the profits would be significantly over the $15,000 mark and even though I still disagreed with this philosophy, since I felt that the present management should be left for the entire year, I believed that

by the end of June we could look forward to earnings in excess of $15,000 monthly or averaging more than $15,000 monthly for the rest of the term."

Now, do you still believe those answers to be accurate as of today?

MR. McCONNELL: I object to the form.

THE COURT: You made those answers to those questions?

THE WITNESS: Yes, sir.

Now, he asked me do I still feel that way and, yes, I still feel that we would have averaged more than $15,000 earnings monthly during the measuring year, yes.

Q But does that refresh your recollection that as of January 30th you also believed that you could make $15,000 in the month of June alone?

A I believed that; yes, sir. I think if allowed to operate with the profit we made in May, we would have made much more than that in June.

Q By the way, Mr. Carlen, after the discussion of the new provision that ISL should request from Plessey, do you recall anyone writing down the words of the provision at the meeting?

A I don't recall who did. I am sure that Mr. Kovar had to make notes or someone. I don't know.

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Q Have you ever seen --

A But I saw the finished document which went to the shareholders which basically was what they had agreed to.

Q Did Plessy review the materials that were sent to the shareholders before they were sent to the shareholders?

A I don't know, Mr. Maloney.

Q Did you ever see the final agreement, dated February 4, 1970?

A I believe I have. In the course of all that has been going on since that happened, but I don't know, Mr. Maloney, under oath whether I did or did not see it.

Q I show you a copy of Plaintiff's Exhibit 3, which is the agreement of February 4, 1970. I would ask you to look at paragraph 5D.

A This is the final agreement, is it?

Q The agreement signed on February 4th, yes, sir.

MR. McCONNELL: Your Honor, I am going to ask that he be shown Plaintiff's Exhibit 4 at the same time.

THE COURT: Well, let's let him look at 3. Let's do one thing at a time.

A What shall I look at it, Mr. Maloney?

Q Paragraph 5D again, Mr. Carlen.

A Yes, sir.

Q Paragraph 5D in the agreement signed on February 4th, did that accurately express your understanding of what would be asked for at the board meeting on January 30th?

MR. McCONNELL: Your Honor, I am going to object to that. Everybody agrees that the lawyers made a drafting error and that that was corrected by the February 18th letter agreement.

MR. MALONEY: I think I have a right to test the recollection of the witness here, your Honor.

THE COURT: You can do that.

MR. MALONEY: I don't think Mr. McConnell should continue to interrupt.

THE COURT: I think you can ask him that question.

THE WITNESS: Now, the question, Mr. Maloney, again please?

Q Does the language appearing in paragraph 5D in the agreement signed on February 4th, does that accurately reflect what you understtood would be asked for when you left the meeting on January 30th?

THE COURT: I take it you are referring again to the next to the last sentence?

MR. MALONEY: Yes, I think we can just go to the

third sentence.

THE COURT: Again "notwithstanding.."

THE WITNESS: Yes, your Honor.

A Well, subject to that change, which was typographical or context in transcription, this paragraph, as I read it, substantially sets forth that which I had agreed to on January 30th, namely, that it would be in the third month and they must average at least $15,000 per month starting with the third calendar month of the measuring year and in order to provide the out, if any time after that you had three consecutive months of losses, then you could also institute this even if you had averaged over five months $15,000.

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Q But there were typographical errors in that document?

A Yes, sir.

Q Now, do you recall when the material was sent out to the shareholders?

A No, I do not recall.

Q Does it refresh your recollection that it was sent out on or about February 2, 1970? Do you still have that document?

A I am looking for it now.

Q Does that refresh your recollection that the proxy material was sent out on or about February 2nd?

A Yes.

Q So the proxy material was sent out to the shareholders before the agreement of February 4 had even been signed? Is that correct?

A I don't know. I presume it is. You hand me the agreement dated February 4, and that is the signing of the agreement, yes.

Q Well, do you know who was personally responsible for sending out the proxy material to the shareholders?

A I don't recall.

Q Would it have been Mr. Kovar?

A I don't know, Mr. Maloney. It might have been

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Mr. Kovar; it might have been Mr. Shapiro.

Q Do you recall who was responsible for preparing the proxy material?

A I presume counsel.

Q That would be Mr. Lewis or Mr. Shapiro?

A Yes, sir.

Q And they would know the date on which they actually sent the proxy material out to the shareholders, I assume?

A I am sure that they would, or their memory may be refreshed.

Q Now, based on your understanding as of June 30 of the provision that would be requested from Plessey in the final agreement, how many months would you be given to achieve profits of $15,000 starting with the first month of the measuring year?

A As I understand your question, you are saying my concept and the shareholders, where we had April and May for the turn-around, then June 1st the averaging process, my concept of that was that it was a number of months to assume a likely average.

Q How many months would you have to reach an average of $15,000?

A Well, quite obviously to have an average you

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need a minimum of two months, Mr. Maloney. I answered it in my concept that if you made $5000 in May and $8000 in June and $12,000 in July and it looked like you were going to make much more, if I had acquired the company I would have been happy with that growth.

Q So that would give you a total of four months within which to reach a $15,000 level?

A Mr. Maloney, I said it's a minimum of two months to strike an average, because I can't average any other way, and if it were three or four, then you would divide the sum total of profits by four.

Q We are all agreed that April and May wouldn't count? Is that correct?

A Yes, sir.

Q Well, did you understand on January 30 that April and May would count in any way towards reaching the $15,000?

A No.

Q They would not?

A They would not. That was my understanding.

Q And you needed two months to have an average of $15,000 starting with the third month?

THE COURT: He didn't say that. He said he needed two months before you could have an average, if I under-

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stand his testimony right.

Q What would the two months be to achieve the average of $15,000?

A Well, the minimum would be June and July, then, so that you could have an average.

Q Then starting the measuring year on April 1, Mr. Kovar would have a minimum of four months in which to reach the $15,000 profit level?

A No -- I don't understand the question. April and May do not count in any way, and starting, commencing June 1st an average monthly profit of $15,000 was my understanding. My statement is you need at least two months.

THE COURT: All he is saying is the first two months are out and you say the averaging requires two months, and that is June and July. So if you had been Mr. Kovar looking over the scene and the closing on March 2, you would have said, "Under this agreement I have got the two months that do not count plus the two months that have to be averaged," that means four months to make the $15,000?

THE WITNESS: Yes. The monthly average started on June 1st, your Honor.

THE COURT: I take it that if during the turn-around period ISL had made a profit, it would not have counted, and if they had a loss during the turn-around

period it didn't count, either? It would start on June 1?

THE WITNESS: Right.

Q Mr. Carlen, do you remember my asking this question and your giving this answer, page 20:

"Q Do you have any recollection of the specific wording of the provision which the members of the board agreed should be included in the contract?

"A Well, not the specific wording. The exact wording was left to Shapiro and Lewis. The intent was to have the three-month period to translate or turn around the earning capacity which I foresaw in ISL."

Do you recall being asked that question and giving that answer?

A Yes, sir.

Q What was the three-month period that you were referring to in that answer?

A Well, I referred to a turn-around period.

Q What would the turn-around period be assuming an April 1 starting date for the year?

A Then by the third month we would have paid our debtors; we would have gotten an orderly flow of materials into the company so that it could manufacture that which it had orders for and begin the vestiges of a good operation in June.

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Q Was it your understanding that if the company failed to make $15,000 in the month of June plus he could have assumed control?

A No, sir.

Q Do you recall my asking this question and your giving these answers, page 25:

"Q What was the operative provision that would or would not allow Plessey to assume management control? What would the company have to do within the three months."

Now, there was a series of objections back and forth. I see no point in reading that, unless Mr. McConnell wants me to.

MR. McCONNELL: Go ahead.

MR. MALONEY: "Witness: My understanding of that was that at the end of three months we would have achieved a level of $15,000 profitability and that in the on-going months beyond that because of the variations of any business enterprise, I strongly urged an averaging, you know, you make $30,000 one month and $10,000 the next, so that it was an averaging type of deal. This was my understanding of what the attorneys were instructed to put in the agreement, and, substantially, what came out of the summary to the shareholders and what we were to vote on is, I think, about like that. That was my understanding, Jim."

mmp7 Carlen-cross

Do you recall being asked that question and giving that answer?

A Yes.

Q "Q So that if I understand you correctly, ISL could have lost money in March, April and May, and ISL would have been permitted to retain management of the company, notwithstanding the fact that there were losses in each of those three months?

"A Yes, because June becomes the third month, and achieving the level of profitability in that month would have indicated the turn-around I was sure was there."

Do you recall being asked that question and giving that answer?

A Yes, absolutely accurate.

Q "Q What was the amount of the profit that the company would have to show in June in order to retain control?

"A $15,000."

Now, do you recall being asked that question and giving that answer?

A Right.

Q Since the time that I asked you these questions and you gave these answers in your deposition, have you changed? Has something happened to refresh your recol-

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lection with respect to the meeting of January 3?

A No. You will recall in the deposition we had previously covered the fact in my comments to you, Mr. Maloney, that it was an averaging position that was involved, and I still had the feeling then, as I do now, that in running the company properly those profits would have been achieved, and that is the sense of my answer to you. I had no fear that that level of profits and, as a matter of fact, the profits in May indicated that it would have been achieved in June, and so there is no problem here.

THE COURT: Just to straighten out my understanding and the jury's understanding of it, I gather you said out in Chicago that if ISL didn't make $15,000 in June, that the take-over provision would become operative. But I understood your testimony here is that that wouldn't be true, because it would be an average, you would have to go through July and get an average before they could take over, which is a little different, because they may have made $5000 in June and $25,000 in July, and averaging would have been all right.

Now, which is right?

THE WITNESS: Well, in the context of the deposition that Mr. Maloney was taking from me, it involved my

concept from a management standpoint of the level of profits that they would need and be able to achieve. That is, in the deposition I had talked about the averaging. Now, after your point is being made that I said absolutely on page 25 that it was $15,000 in June, then that testimony at the deposition was improper and incorrect, because that never was my understanding. I gave it then in the context of the total provisions of what they could have made.

Q Page 27:

"Q And if based on your understanding the company had achieved only $12,000-plus they could have achieved management control at the end of June or the 1st of July?

"A Technically, according to my understanding, if they had, let's say, lost money in April and May and only made $12,000 in June with indications that there was no reason to expect it to continue, under the terms of the agreement that they could, in fact, assume. Whether they should is another question. I think it was stupid."

Now, was that answer also incorrect at your deposition, Mr. Carlen?

A Well, could I see it or read it?

Q Yes.

A Now your question, sir?

Q Is the answer which you gave to that question

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in Chicago back in July, 1973, correct or incorrect?

A Well, it is obviously incorrect in the context of the takeover of the company. At that time, Mr. Maloney -- and I am trying to recall what the context of your question was or how it was -- I read it to understand it --

Q Do you want me to read more of it? I think we were discussing this for ten pages.

A Well, I was looking at your question.

Q I would like to give you the opportunity to read it. Look at pages 17 through 27.

THE COURT: If he is going to do that, we will take a recess. I will give you a chance to see the context.

THE WITNESS: All right.

(Short recess.)

BY MR.MALONEY:

Q Would you like the deposition back?

A No, I read it and can answer your question now.

Q What was the context in which I asked you those questions and in which you gave those answers?

A My understanding of the context was that it established what the level of the operations would be, that in my confidence that after the turn-around they would

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achieve a $15,000 level. I thought that that would be very possible in June, and it was given in this context.

Q It was not your understanding that I was questioning you concerning what you had instructed Allan Kovar to have included in the contract concerning management control?

A No. When the records were sent me, I recognized that in that and I did give that answer in the context of my belief that we would achieve that level once we had the money and the people were working and we had the supplies and everything there.

Q You did not understand when I was questioning you that I was asking you what the specific provision was that the directors decided that January 30 should be included in the agreement to be signed with Plessey?

A No, sir, I did not, Mr. Maloney.

Q Well, who was going to make the decision as to what the specific provision to be included in the agreement would be?

A Well, again, at the directors' meeting of January 30 it was obviously left up to Mr. Kovar with the minimums that had been established, the two-months' turn-around period, and then the ability to make the profits from then on. Again I felt confident on January 30 that with the

funds and the ability to get the inventories to produce the goods, based upon the backlog, that we would achieve it.

Q Mr. Carlen, I think you testified earlier that the language that went into the February 4 agreement was not accurate and that was later corrected by a letter between Mr. Lewis and Mr. Dubin? Is that correct?

A That is correct.

Q When for the first time did you learn that the provision in the February 18 letter had been changed at the closing?

A In June, Mr. Maloney.

Q Now, do you have any recollection of meeting with Allan Kovar or talking with him on the telephone between March 2nd and June 9th?

A Yes, I do.

Q On how many occasions did you meet with them?

A Perhaps we met two or three times. The one I remember specifically was the June 9 meeting in my office, because he made me aware over the telephone of some of the wishes of Plessey in May, and I felt that we had to have a meeting to discuss this. But we did have a number of occasions to talk on the telephone, or he had sent letters. I think that was the more frequent contact.

Q Do you recall any discussion between March 2nd

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and June 9th concerning any changes that had been made in the contract?

A There were none, no. I was not informed until I became aware of this.

Q Mr. Carlen, I show you Defendant's Exhibit X in evidence. I ask you if you can identify that document?

A Yes, sir.

Q Can you tell the jury what the document is?

A Well, it's a letter to the four other directors from Mr. Kovar on the Plessey acquisition and ISL liquidation. It refers to the financial reports for 1969, unaudited, [illegible] and Plessey's additional investment, the charge on the extra $200,000.

Q Could we pause there for a moment. Do you recall receiving a copy of that memorandum some time in March, 1970?

A Yes, I believe, Mr. Maloney, I returned to my office in late March -- I had been away -- and saw it then.

Q Now, with respect to the paragraph there concerning Plessey's putting in an additional $200,000 and charging 10 per cent interest on that, do you recall having any discussion with Mr. Kovar between March 5 and June 9 concerning that provision?

A We did discuss it briefly, I believe, in the

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context that whether or not it was necessary, and this, of course, depends on whether or not you wish to borrow money or how much is needed to finance, are you going to pay your bills in 30 days or 60 days or 90. We had not been paying very much of them and had been struggling. Would you want to become current and have everything on a discount basis, you might need this amount of money; if you didn't, you wouldn't need it.

Q Did you question Mr. Kovar's authority to agree to that change?

A No, this is a normal business financing arrangement, you know, whether you need 400 or 600 or 800 thousand is a decision of management.

Q So it was your belief that Mr. Kovar had sufficient authority as the president of the company to agree to that change at the closing on March 2nd?

A He did. The chief executive officer can usually borrow funds.

Q When you learned that that change had taken place at the closing did you ask Mr. Kovar whether any other important changes had been made in the contract at the closing?

A No, because, again, Mr. Maloney, I would not take this as part of the closing or a change, the decision

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of how much money. Under one set of circumstances I might run the business with 400,000, another set, with six hundred, and another set with 800,000.

Q Did you understand that that change would affect the amount of profit that the company would have to make during the measuring year in order to collect the full $1,260,000?

A I don't recall any discussions. My impression would be that it would not. Again, from memory, Mr. Maloney, there was a provision if Plessey required us to do anything outside the terms of the agreement it would not count on the measuring year.

Q And you don't recall discussing with Mr. Kovar whether or not any other changes in the contract had been made at closing?

A I do know that I did not.

Q After Mr. Kovar and the attorneys, Lewis and Shapiro, had reached agreement with Plessey on the management control provision that ended up in the February 18 letter, was that letter ever submitted to the board of directors for their approval?

A I don't believe so, Mr. Maloney. I couldn't tell you exactly when I saw a copy of that February 18 letter. I don't remember.

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THECOURT: Did you have another meeting of the board after the January 30 meeting, prior to the closing of the contract on March 2?

THE WITNESS: No, sir.

THE COURT: That was the last meeting you had?

THE WITNESS: That was the last meeting. There were the shareholder meetings, but I didn't attend those.

THE COURT: They were in Barbados?

THE WITNESS: Yes, they were both in Barbados.

Q Did you learn that Plessey had given notice that it was assuming management control in June, 1970?

A I believe it was Mr. Sinsheimer's letter, wasn't it?

Q That would be the letter of June 9, Plaintiff's Exhibit 26?

A Yes.

Q Well, do you recall the first date on which you saw the original or a copy of that letter?

A Not the exact date, Mr. Maloney.

Q Do you recall having any discussions with Mr. Kovar prior to your seeing this letter concerning the question of whether or not Plessey was going to assume management control based on the May results?

A Mr. Kovar met in my office the morning of June 9,

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because he had rejected a number of things that Plessey was requiring him to do. I was aware of these changes in written communications. Some time at the end of May or the first part of June I confirmed a meeting in my office on June 9. Mr. Kovar said at that time it looked like this was about to happen. My understanding was that the handwriting was on the wall, that they were going to insist in these things. I have no minutes of that particular June 9 meeting, Mr. Maloney, but we discussed a number of things about the business affairs.

Q Do you recall who else was present besides yourself and Mr. Kovar?

A Well, Mr. Haggerty, I believe, was there, and Mr. Matthew Murray, another shareholder.

Q When you received the letter of June 9,what was your reaction to it?

A I was amazed, shocked, and didn't understand it.

Q Well, what part of the letter didn't you understand?

A Well, the early takeover, the throwing out the window of what I conceived the averaging positions in June and July. You know, if we had not make any money in June and July and we had such a letter on August 9, I would completely understand it. But on June 9 I fell out of my

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chair and got on the phone.

Q Let me back up a moment. The first time you had seen a copy of the amendment that had been signed at the closing on March 2nd is when?

A The closing on March 2nd, the amendment? I don't recall that I had seen it. I don't remember, Mr. Maloney.

Q I show you a copy of Plaintiff's Exhibit 5 in evidence. It contains the amendment signed on March 2nd by Mr. Albert and Mr. Kovar, and ask you if you recall when for the first time you saw a copy of that letter?

A I would assume, Mr. Maloney, that it was some time after the receipt of the June 9th, because again I called everyone I could get ahold of and saying, "How come? What happened?"

Q The reason for your surprise when you received the June 9 letter is even at that point you still didn't know that the contract had been amended on March 2nd?

A That is correct.

Q Now, Mr. Sinsheimer referred to the March 2nd amendment in his letter dated June 9, Plaintiff's Exhibit 26, didn't he?

A Yes. I am sure I asked Mr. Shapiro or Mr. Lewis, and I don't recall exactly -- I am sure that Mr. Kovar or counsel informed me or sent me a copy of these changes at

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that moment in time.

Q Did you then make inquiries of Mr. Kovar and Mr. Lewis as to why they had agreed to the amendment?

A Yes, sir. I was quite upset with it.

Q What was your understanding of the change which had been made with respect to management control based on the March 2nd amendment, Plaintiff's Exhibit 5?

A Well, it shortened the period by 30 days -- that was my understanding of it-- which was impractical, to turn around this company in that length of time. And the profits that were indicated in May, you know, seemed like the turn-around was succeeding, and why do this. It was just beyond my comprehension why anybody would want to do this.

Q What did you understand the March 2nd amendment was? What was your understanding of the earliest date on which Plessey could assume management control?

A Under the March 2nd amendment?

Q Yes, Plaintiff's Exhibit 5, paragraph 2.

A Well, as I said, it shortened from the month of June into the month of May, was my understanding of this; it cut 30 days off of the turn-around.

Q Well, was it your understanding that Plessey had a right to assume management control unless ISL made

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a profit of $15,000 in the month of May?

A No, Mr. Maloney. I called my counsel right away to ask his legal opinion, my personal counsel, about this matter, and we had a number of discussions over the next period of time, both to this and other matters, because I am not an attorney and I didn't know very honestly as a layman the rights.

Q Who was your personal attorney?

A Mr. Lawrence Kearns, in Chicago.

Q Now, up to this point had Mr. Kearns been involved at all in drafting any of the documents that were prepared in connection with this transaction?

A No, he is a personal attorney of mine and deals with my personal affairs.

Q How about Mr. Lewis and Mr. Shapiro, did you ask them what the effect of the amendment was?

A No, I don't believe I did. To me the effect was apparent and I was interested in why was it done, you had no right to do this, et cetera, et cetera. No, I didn't ask their opinion. I presumed that it, in fact, did.

Q Well, was it your understanding that even under the March 2nd amendment Plessey was assuming management control one month early?

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A Well, legally I referred it to my counsel to find out his opinion on the whole bag of worms. It was my business opinion that und - the evidence of the profit in May it was not a wise thing for them to do. So there are two answers to that question. I would not have done it.

Q Do you know who prepared the language of the March 2nd amendment in paragraph 2 of Plaintiff's Exhibit 5?

A No, I don't.

Q Do you know who attended the closing in Barbados on March 2nd on behalf of ISL?

A I believe it was Mr. Kovar and Mr. Lewis.

Q Did you ever ask Mr. Lewis whether he participated in preparing the language which appears in that amendment?

A I guess I presumed that he had, having been there.

THE COURT: Well, you didn't ask him? Did you ask him?

THE WITNESS: I don't remember, your Honor. I may or I may not have asked him.

Q Well --

A He was there. He was our counsel, and he and Mr. Kovar were there. I presume that both of them did this.

Q Do you recall either Mr. Kovar or Mr. Lewis

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saying to you on or about June 9 or 11 that under the language Plessey was assuming control one month early?

A They may have, Mr. Maloney. But my memory isn't that good. I am sure that in the context of all the discussions that we had in the week following the receipt of this letter I had a number of discussions about how did it come about, did they force us to do this, why did you agree to it, what, if any, were the legal implications. I asked my counsel this as a shareholder and director, and in a desire to let my friends know, who had put their money into the company to keep it going.

Q Mr. Lewis and Mr. Shapiro were the attorneys representing the company in connection with this transaction? Is that correct?

A Yes.

Q And you have no recollection of asking them whether Plessey had a right to assume management control as of June 9 under this provision?

A No, I don't have a specific remembrance of that, as I understand your question.

Q Now, at any time between June 9 and June 17, on the day on which you wrote to Mr. Sinsheimer, do you recall Mr. Kovar or Mr. Lewis saying that Plessey had no right to take over management control because "we have an

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additional month to make a $15,000 profit?"

A I have no specific remembrance. We discussed should we then enter into litigation against Plessey? What was the point in doing this? You know, that was part of the discussion, how we should approach it, which ended up in my writing the letter of June 17. We had a relationship with Mr.Sinsheimer in our corporations, and so I thought I would write the letter which Mr. Lewis and Mr. Shapiro drafted and I changed somewhat, which went to Mr. Sinsheimer.

Q Well, was there any discussion of getting Mr. Sinsheimer on the telephone right away and saying, "This amendment is not binding because you improperly forced us to sign it on March 2nd"?

A No, I think all of the discussions were on what to do. The decision reached was that I should write him by registered mail stating our position in writing, and then after the reply, see what the reply was,and then after the reply, go ahead and meet with him.

THE COURT: Going back to your testimony a while ago about averaging, what does averaging mean in this March 2 letter, next to the last line?

THE WITNESS: Average less than $15,000 per month. When I read that at any time, your Honor, I would try to conceive of a period of time what does it average up,

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three months, four months.

THE COURT: What I am getting at is this, in reading this, how do you construe the average which is used here where it commences May 1. You say that was starting a month earlier. But May 1, crediting the net profits, not charging the net losses, average less than $15,000 per month, when is the first time you can average?

THE WITNESS: According to this paragraph, it would start in May.

THE COURT: In other words, you could take the May earnings, if they were less than $15,000, that would be an average so far as you are concerned?

THE WITNESS: Not one month, no.

THE COURT: What?

THE WITNESS: No.

THE COURT: I am trying to get that straightened out.

THE WITNESS: Well, to me, if you say a monthly average or an average per month, I repeat again my concept of this was several months, three, four, five.

THE COURT: It says here if profits of ISL commence May 1, 1970, and then it has got this other matter, we can stipulate average less than $15,000 a month. Now, when would that take place?

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THE WITNESS: Well, May and June, if you average, if you made $30,000 in May and June, that would be an average of $15,000 per month.

Q Mr. Carlen, do you recall that in the second draft of the agreement that you had at the June 30 meeting the language that Plessey was proposing was that you would have to make $15,000 in the month of June and $15,000 in every one of the remaining nine or ten months of the measuring year? Is that correct?

A My impression of what they were asking, would you say, Mr. Maloney?

Q Yes.

A Yes.

Q Did you believe that that was unfair, because it's very difficult to be able to foresee whether or not you can make a certain amount of profit in every month of the year for nine or ten months?

A Yes, Mr. Maloney. It's very difficult in any business to keep profits per month from changing 40, 50, 60 per cent in any two-month period.

Q Were you ever present in any meeting in which it was discussed that the reason for putting the word "average" in the contract was that Plessey had agreed that if Mr. Kovar could achieve a $15,000 profit by the month

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of June, therefore, we will let him average as long as he kept the average up to $15,000 a month?

MR. McCONNELL: I object to the form of that question.

THE COURT: Can you answer it?

THE WITNESS: There was no discussion of that.

xx (Defendant's Exhibits AM and AS marked for identification.)

Q Mr. Carlen, I show you Defendant's Exhibit AM for identification and Defendant's Exhibit AS for identification. I ask you if you could explain to the jury what those documents are?

A Well, these are part of the discussion, again, the rough drafting of that, my letter of June 17 to Mr. Sinsheimer.

Q What is AS?

A AS, I believe, is a draft which Julius Lewis sent to me.

THE COURT: A draft of a letter you might send to Mr. Sinsheimer?

THE WITNESS: Yes, your Honor.

Q What is AM?

A That is his cover letter, I presume, attached to this, saying he is sending me a letter.

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Q Is it your best recollection that AS, the draft letter, is what Mr. Lewis sent you with his letter to you dated June 15, Exhibit AM?

A As far as I can tell, and it has got my handwriting on it, so it must be.

MR. MALONEY: Your Honor, I would like to offer these in evidence.

MR. McCONNELL: No objection.

THE COURT: Received.

xx (Defendant's Exhibits AM and AS received in evidence.)

MR. MALONEY: Your Honor, I would like to read just AM.

(Mr. Maloney read Defendant's Exhibit AM to the jury.)

Q Now, who was Mr. Ted Murray, Mr. Carlen?

A He was one of the shareholders and he was a friend of mine who had introduced me to Mr. Kovar and International Scientific, Ltd. when they were seeking money.

Q Is Mr. Murray an attorney?

A Yes, he is.

Q Do you know what firm he is with?

A Seyfirth, Shaw, Fairweather & Geraldson.

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Q Is that the firm in which Mr. Kovar was a partner at one time?

A Yes.

Q Now, by June 15th you had had an opportunity to review the March 2nd amendment, I believe that is Plaintiff's Exhibit 5?

A I don't know that I had reviewed it, Mr. Maloney, but it certainly had been part of the discussion.

Q Do you have any recollection whether between June 11th and June 15th you discussed the amendment with Mr. Lewis or Mr. Shapiro?

A Yes, I am sure that I did. I was aware at the time of this that foreshortening of the 30 days.

Q You discussed what response should be made to Sinsheimer, is that correct?

A Yes, the form of response.

Q And based upon the discussions which you had with Mr. Lewis and Mr. Shapiro, Mr. Lewis drafted this letter, Defendant's Exhibit AS?

A Yes, sir.

Q Now, did that form the basis of a letter which you sent to Mr. Sinsheimer, dated June 17, 1970, Plaintiffs Exhibit 27 in evidence?

A Yes.

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Q Do you recall whether you or anyone else made any significant changes in Mr. Lewis' draft before it was put in final form and sent?

A Yes, there were a number of changes.

Q Do you have a copy of the letter on which you made those changes?

A No, I don't have, Mr. Maloney, but my feeling was that it was a bit, again, abrupt and that I wanted to make it more businesslike and with some feeling between two human beings.

Q Now, after you sent your letter of June 17th to Mr. Sinsheimer and then you received back his letter of June 22nd, Plaintiff's Exhibit 28 in evidence, between those two dates did you have any telephone conversations with Mr. Sinsheimer?

A Not that I recall. I don't believe so, Mr. Maloney. I do not believe so. I don't know.

Q Between the receipt of Plaintiff's Exhibit 28, Mr. Sinsheimer's letter of June 22nd, between your receipt of that letter and the meeting at Mr. Sinsheimer's office on July 13th, do you recall on how many occasions you spoke with him on the telephone?

A No, I don't. I made some efforts. He was away. I believe someone, his secretary or some other friend, said

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he was in London for a meeting, but we finally arrived at a date which I changed my schedule to be able to make and flew into New York especially for that meeting and flew directly back to Chicago afterwards.

Q Now, turning to your notes and memorandum of your meeting with Mr. Sinsheimer on July 13th, Plaintiff's Exhibits 29 and 30, have you had an opportunity to compare those two exhibits and determine whether there was anything of importance in Plaintiff's Exhibit 29 which you did not include in Plaintiff's Exhibit 30 when your secretary typed up your notes.

A I don't think there is, Mr. Maloney, of substance. Obviously, it is a few short notes on a 45-minute conversation or a 40-minute conversation.

Q Do you recall any topics of any importance being discussed with Mr. Sinsheimer on July 13th that you did not include in your memorandum, Plaintiff's Exhibit 30?

A Well, obviously, as any note is made, it is made to recall the basic part of the discussion which you think is important.

Now, each sentence here represents several sentences and several conversations.

Q But do you recall discussing any other important

topic that you did not put in your notes, which is Plaintiff's Exhibit 29?

THE COURT: Can't you help the witness out?

A What do you want? I can go over each paragraph and try to recall for you everything that was said.

MR. MALONEY: May we can shorten this.

THE COURT: I wish you would.

MR. MALONEY: I would be glad to stipulate with Mr. McConnell that Plaintiff's Exhibit 30 represents everything that was discussed --

THE COURT: What difference does it make whether it represents everything? I think he has said he typed the memo on the basis of his notes. I don't know why you are chasing this rainbow.

THE WITNESS: I can only say that it doesn't represent that was discussed.

Q Can you recall any other important topic that was discussed that does not appear in the memo?

A Well, Mr. Maloney, we discussed the reputation of Plessey as a fine company. Included in that was the relationship between two of Plessey's subordinates -- I mean subsidiaries, I'm sorry, and Joseph T. Ryerson & Son.

The relationships with Frank Keppel were discussed

at great length and who Frank Kapple was at Dunbar & Kapple.

Do you want me to go through each one like this?

Q No, no, I am just trying to probe your recollection of whether there was some other item discussed that you did not put down in the notes.

A There were many items discussed --

THE COURT: I think I am going to sustain the objection. If you want to ask him about something that is in one of these exhibits and ask him whether it was in the other or why not, but I don't know why you should put the witness through this performance.

MR. MALONEY: All right, your Honor. I will go on to something else.

THE COURT: Thank you.

Q Mr. Carlen, when you sent your letter of June 17th to Mr. Sinsheimer, as of that date did you believe that Mr. Sinsheimer had a right under the contract, as amended on March 2nd, to assume management control?

A I didn't know at that moment.

Q You did not think that he had the right to assume management control?

A Mr. Maloney, I am not an attorney.

THE COURT: But you didn't think so; you said that.

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As far as you were concerned, he didn't?

THE WITNESS: As far as I was concerned, he didn't. It was a lousy thing. I was very upset, yes.

THE COURT: Right.

Q Mr. Carlen, referring again to your deposition, page 58:

"Q Do you recall discussing with anyone in June, 19" -- and it says "17", I believe it should be "70" -- "whether or not Plessey's assumption of management control was in accordance with or in violation of the terms of the contract?

"A Well, I believed that I was apprised during my first reaction of the fact that it had been changed at closing and, thus, the question of whether it was in violation of the final agreement never occurred to me. I said, well, you agreed to a change which was not approved by the directors and thus assumed that with the revised contract, as changed on closing, Sinsheimer had this right.

"Q You say you assumed that?

"A I assumed that with the changes, my interpretation of those changes.

"Q I take it you are referring to the amendment of March 2nd, a copy of which was marked as Defendant's Exhibit O at the examination of Mr. Kovar?"

That is the dame document which is Plaintiff's Exhibit 5 in evidence here.

Your answer was: "Yes."

A Yes, I said I assumed this as a layman and that is why I went to my attorney and sought his advice. I don't know whether that is where you asked me for my personal attorney following that or not or if it was later.

b2

Q Other than your discussions with your personal attorney, you recall no discussions with Mr. Lewis or Mr. Shapiro concerning whether or not Plessey had taken over in violation of the contract; is that correct?

A Yes, because I didn't know at that point, I am not going to accuse Allan Kovar or Julius Lewis of something which, you know, I have no supportive knowledge of at that moment in time and I did not.

Q When for the first time did someone advise you that Plessey's assumption of management control on June 9th was in violation of the terms of the amendment signed on March 2nd?

A It was some time just prior to my sending the letter to the shareholders, which I did as an individual and as a director, advising them of what had taken place; that the question of whether this was proper action on the part of Plessey or Mr. Kovar was notresolved; that there

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was a question here.

Q Was that some time in August?

A I would guess it could be -- when did my letter to the shareholders go out?

Q August 11th, I believe.

A It could have been the first week in August when Larry Kerns and I had a discussion about this, yes.

Q So that when you met with Mr. Sinsheimer on July 13th, no one had advised you by that date that Mr. Sinsheimer's assumption of management control on June 9th was in violation of the terms of the amendment signed on March 2nd; is that correct?

A No one had advised me when I was talking to Mr. Sinsheimer that the action taken by Plessey and Allan Kovar, the representatives, was per se illegal.

I objected to it with Mr. Sinsheimer and said it wasn't proper and it wasn't very intelligent as far as I was concerned.

MR. MALONEY: Your Honor, I don't think that is an answer.

THE WITNESS: I had no legal opinion letter which said that.

MR. MALONEY: I don't think the witness answered the question.

THE COURT: The question was sort of complicated. I think all he is asking is had anybody told you that the takeover was in violation of the contract as amended at the closing?

The answer is, I take it, nobody had?

THE WITNESS:Nobody had advised me.

MR. MALONEY: I have no further questions, your Honor.

THE COURT: Okay, I am going to adjourn and, ladies and gentlemen, I am going to try to shorten the lunch hour if you don't mind. I have a number of other matters this afternoon and I am going to try to release you at 3 o'clock so I can take care of these other matters.

Would you like to go now and come back at a quarter to 2.

(Luncheon recess)

eoh 1 Carlen-redirect

AFTERNOON SESSION

1:50 P.M.

(In open court; jury present.)

R A Y M O N D N. C A R L E N, resumed.

THE COURT: Good afternoon, ladies and gentlemen.

You may proceed, Mr. McConnell.

MR. McCONNELL: I just have a couple of questions, your Honor, of Mr. Carlen.

REDIRECT EXAMINATION

BY MR. McCONNELL:

Q Mr. Carlen, do I understand your testimony to be that under the original contract that ISL management had the months of June and July to make the average profits.

A Yes, that was my understanding in the terms of the average.

Q Did I further understand you to testify that you understood the March 2nd amendment to shorten that period by 30 days?

A Yes, that is what I said, Mr. McConnell.

Q Was it further your testimony that under the March 2nd amendment ISL management had the months of May and June to make the $15,000 average profits?

A Yes.

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Q Now, when you testified that you didn't know in your mind whether the takeover was legal or valid, what were you referring to?

A Well, I was referring to my understanding about the March 2nd amendment and I was relating to that and I didn't know whether that was valid at that moment in time or not.

Q By that are you referring to whether or not Kovar had authority to enter into it?

A That is correct.

Q But, assuming for the moment the March 2nd amendment is valid, even under the March 2nd amendment, what is your understanding as to the earliest that Plessey would be entitled to take over management?

A Well, when the average monthly, which to me, as I described before, meant at least two or more months, was at that level so that that would have been in effect, then, with the foreshortening May and June.

Q When you wrote Mr. Sinsheimer on June 17th and later when you met with him on July 13th, was there any doubt in your mind that the takeover, whether under the original agreement or the March 2nd agreement, was premature?

A There was no question in my mind as to that point.

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MR. McCONNELL: That is all I have, your Honor.

THE COURT: All right.

MR. MALONEY: Your Honor, I have a couple of questions, but I would like to take just one minute.

THE COURT: All right.

(Pause.)

RECROSS EXAMINATION

BY MR. MALONEY:

Q Mr. Carlen, you testified this morning and I think we established that based on your understanding of the original agreement Mr. Kovar would be given June and July to average $15,000, taken together with April and May comprised a total of four months into the measuring year, is that correct?

A That would be four months into the measuring year; yes, sir.

Q Now, under the March 2nd amendment, if that amendment was authorized and is not invalid, your understanding was that that shortened the four months to three months, namely, April and then May and June to average the $15,000?

A Yes, that May and June period would then be the averaging if you accept the two-month philosophy; yes, sir.

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Q So the March 2nd amendment shortened Mr. Kovar's time from four months to three months, is that correct?

A Yes, I believe I testified that it foreshortened 30 days, in my opinion one month.

MR. MALONEY: If your Honor please, at this time I would like to withdraw my objection to Plaintiff's Exhibit --

MR. McCONNELL: I don't know, your Honor --

THE COURT: What exhibit are you talking about?

MR. MALONEY: Plaintiff's Exhibit 31.

THE COURT: Is this one he offered?

MR. MALONEY: Yes, that was the letter to the shareholders.

MR. McCONNELL: I offered it and he objected to it.

MR. MALONEY: I would like to withdraw my objection at this time, your Honor.

MR. McCONNELL: Your Honor, I was going to examine the witness --

THE COURT: I'll tell you what I'll do: I'll let you put this in as a defendant's exhibit, if jyou want to. He offered it and you can put it in as a defendant's exhibit.

MR. MALONEY: No, your Honor, I don't want to

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put it in. I just withdraw my objection of Mr. McConnell offering it as a plaintiff's exhibit.

Let's reserve it and let me ask a couple of questions.

THE COURT: If you do anything, I won't let you withdraw your objection, I will let you offer it as a defendant's exhibit, if you want to.

MR. MALONEY: Can I ask a couple of other questions first, your Honor?

THE COURT: Yes.

Q Did I understand your testimony correctly, Mr. Carlen, that the first time that you realized that-- withdrawn.

Assuming the March 2nd amendment was valid and became part of the contract, did you testify this morning that the first time that you realized that the takeover was premature under the language of that amendment was some time in the first week of August?

A No, I don't think so, Mr. Maloney. If I understand your question -- would you rephrase it again to make sure that I understand it, please?

Q As of July 13th --

A Yes.

Q -- did you believe that the March 2nd amendment

was valid and part of the contract?

A I was not sure, as I described at that time, whether or not it was valid, Mr. Maloney. I felt that it was improper in either event, premature without any reflection upon whether or not the agreement between Mr. Kovar and Plessey, the changes, the March 2nd amendments were valid. I still felt it was improper.

Q But if it was authorized and it was valid, when did you first determine that the takeover was premature under the amendment?

A During the discussions that took place between June 9th, in that area, as far as my personal feelings were concerned. That is when I went to see Mr. Sinsheimer. I believe you mentioned the date July 13th. In my discussions with him we discussed this point.

Q Even as of that date you thought that Plessey had taken over one month early under the March 2nd amendment?

A Yes, there was no attempt at averaging. During the memorandum of discussion with Mr. Sinsheimer, we discussed the fact that they had made money in May and they were going to do better in June so why do it?

MR. MALONEY: I will offer the August 11th letter as a defendant's exhibit without admitting the accuracy of any of the statements therein.

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MR. McCONNELL: No objection.

THE COURT: All right.

MR. McCONNELL: Can I now have Plaintiff's Exhibit 31 in evidence?

MR. MALONEY: They are the same document.

THE COURT: Let's not waste time. They are the same document.

xx (Defendant's Exhibit AT received in evidence.)

xx (Defendant's Exhibit CL marked for identification.)

MR. McCONNELL: What is CL?

MR. MALONEY: I will show it to the witness.

MR. McCONNELL: Could I see it before?

MR. MALONEY: Yes, sure.

Q Mr. Carlen, I show you Defendant's Exhibit CL for identification and ask you if you can tell me what that is.

A CL looks like a rough draft of my letter to the shareholders.

Q Do you know who prepared that draft, Mr. Carlen?

b2 A I did.

MR. MALONEY: I offer it in evidence, your Honor.

THE COURT: Have you seen it, Mr. McConnell?

MR. McCONNELL: I have seen it before, but I would like to look at it again.

No objection.

THE COURT: Received.

xx (Defendant's Exhibit CL received in evidence.)

Q Referring to Exhibit CL, Mr. Carlen, the draft, do you recall who you discussed that draft with or who reviewed it before it was sent to the shareholders in the form of Exhibit AT, a letter, dated August 11th?

A Mr. Lawrence Kerns, my attorney, I know reviewed it. To the best of my knowledge I believe I may have discussed it with others, but basically my counsel and myself and I know various other directors of ISL I discussed it with them.

Q How about Mr. Lewis and Mr. Shapiro, did you discuss it with either of them?

A I believe I did, yes, but I don't have any notes here from my files to answer under oath that I did not or I did.

Q Now, in the final letter I believe there was a change in the second paragraph from the draft letter. AT has some language in the second paragraph which does not appear in the second paragraph of the draft?

A Yes, sir.

Q Would you read that second paragraph for us, Mr. Carlen?

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A In which?

Q In the final letter you sent to the shareholders, AT.

A AT?

Q That is the one with your signature on it.

A "The takeover was upon conditions imposed changing from three to two months the effective time to raise level of profits per month to 15,000 on the measuring year in an amendment demand by Plessey at the last minute as a condition to close. These were not known to me and, if known, would not have been acceptable. Obviously, I did not attend the negotiations, was not consulted and cannot determine as a matter of hindsight how I would have reacted."

What were the three months that you were referring to when you wrote your letter to the shareholders?

A Well, I am sure that they were April, May and June.

Q But I thought under the original agreement you had April, May, June and July, which is four months to make $15,000.

A Would you askyour question again then? I didn't understand it, Mr. Maloney.

Q I thought I understood your testimony so far today

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to be that under the original agreement, which you instructed Mr. Kovar and Mr. Lewis to make with Plessey on February 4th, the company would not be charged with any results in April and May and they would have June and July to put together to average profits of $15,000 a month and that would be a four-month period into the measuring year?

A Right.

Q Before Plessey could require a $15,000 profit, isn't that right?

A Right.

Q Now, under the March 2nd amendment, I think you testified this morning that that moved it back 30 days so that you would have April that couldn't count against you and I believe the language said March wouldn't count either, but you would have May and June to reach the $15,000 profit level. Now, that would be April, May and June, which is three months of the measuring year, is that correct, so that in June, 1970, was it your understanding that the amendment moved back from four months to three months or was it your understanding, as you said in your letter to the shareholders, that it moved back from three months to two months?

A I meant in the letter that it had foreshortened

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the period 30 days, that is, March and April, as you indicated, and to me in my mind the first two months after the closing, which I think was March 2nd, did not count, so I was looking forward to June and July as the months; May, June and July and this foreshortened it 30 days was the impression that I have.

Q What happened to April? Under what you just said now, April was a part of the measuring year.

A Right.

Q And we have to count April,May, June and July and that is four months, is it not?

A In my discussion to my friends,what I wanted to say was it had been shortened 30 days.

Q So that when you wrote that it had been changed from three months to two months, you meant that April, May, June and July had been changed to April, May and June?

A I meant that it had been foreshortened 30 days and I was talking about that.

MR. MALONEY: I have no further questions, your Honor.

THE COURT: Any other questions?

MR. McCONNELL: Yes.

BY MR. McCONNELL:

Q Mr. Carlen, will you read the rest of the

letter from which Mr. Maloney left off starting with "I requested ..."

A I requested a conference with Mr. Sinsheimer to discuss the reasons for the Plessey takeover and the many problems involved. He first refused and then agreed to such a meeting, which took place on June 13, 1970.

"During the meeting we discussed the conditions leading up to the Plessey assumption of management responsibility and our rights as shareholders of ISL (now Scientific Holding Company, Limited) to receive reports as needed to evaluate the good faith management of Plessey. I took the position that the amendments to the agreement under which Plessey assumed the management were not made with the approval of the shareholders and, hence, the assumption of management by Plessey imposed upon Plessey an extraordinary responsibility to reach the proper goal of $360,000 for the measuring year or be prepared to redress the shareholders for any damages sustained as a result of its failure.

"While Mr. Sinsheimer (who I found quite impressive) would not agree to furnish your company or its officers with such financial information and rejected the proposition that Plessey was a trustee for the benefit of ISL shareholders, he did express several times his

confidence that profits of the Barbados facility, as managed by Plessey, will be such that the maximum payment under our contract will be made by Plessey next spring."

MR. McCONNELL: That is all, your Honor.

THE COURT: Any further questions?

MR. MALONEY: Yes, your Honor, I would have one more question based on the balance of the reading of the letter.

BY MR. MALONEY:

Q Mr. Carlen, referring to the next to the last paragraph where you say, I took the position that the amendments to the agreement under which Plessey assumed the management were not made with the approval of the shareholders..."

Had the shareholders ever been given any document containing the language upon which you based your understanding that under the original agreement you would have four months within which to average the $15,000 profit?

A They have that which we referred to previously in this statement and explanation sent to the shareholders.

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T2 Q That would be the proxy material that was marked as an exhibit?

A Which I referred to, and that called for the goal of $360,000.

Q Did I understand you correctly this morning that the understanding between the parties was never reduced to writing until it was placed in the February 18 letter from Mr. Lewis to Mr. Dubin? Is that correct?

A Would you say that again?

Q Let me show you the documents. That would be fairer.

MR. McCONNELL: I think this is going beyond any direct examination.

THE COURT: I think so, too. I think we have been over this. It has nothing to do with the redirect, which was purely reading from that letter.

MR. MALONEY: I could ask one more question, then.

THE COURT: You can.

MR. MALONEY: I won't pursue it any further. I have no further questions.

THE COURT: Thank you, Mr. Carlen.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

MR. McCONNELL: Your Honor, we have another

scheduling problem, and Mr. Maloney has agreed that we can call Mr. Lewis at this time and continue to interrupt Mr. Kovar's examination.

THE COURT: Go ahead.

J U L I U S L E W I S, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McCONNELL:

Q Will you state your full name, Mr. Lewis?

A Julius Lewis.

Q Where do you reside?

A 1524 North Dearborn, Chicago, Illinois.

Q You are an attorney, I take it?

A Yes, sir.

Q With what firm are you associated?

A Sonnenschein, Levinson, Carlin, Nath & Rosenthal.

Q Did you have occasion to act as attorney to ISL in connection with the acquisition negotiations with Plessey?

A Yes, I did.

Q Will you state approximately when you received the first draft of the contract?

A Somewhere around mid-January. I believe it

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was sent under date of January 16.

Q I show you what has been marked Plaintiff's Exhibit No. 1 and ask you if you can identify that as the first draft of contract which you received on or about that date?

A Yes.

Q Who had management under the first contract draft?

A Plessey.

Q Following that draft did you have some face-to-face discussions with the Plessey people?

A Yes, I did. I negotiated with Seth Dubin all of one day here in New York.

Q Could you fix that date, approximately?

A Some place between the 18th of January and the 25th, I think. I am not quite sure when.

Q What did those discussions relate to so far as any requested changes in the contract?

A Well, there were several changes. The one that we regarded as essential was the change from Plessey management to a continuation of the old ISL management, Mr. Kovar and his management team. There was a change about what lines of business would be counted as profit, as part of the profit formula. I think there were other items that I do not recall now.

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Q Well, do you recall at that meeting giving Mr. Dubin some suggested language to be included in the contract with respect to management of the business during the measuring year?

A Yes, I did.

Q I show you what has been marked Plaintiff's Exhibit 6, which is a Telex from Mr. Dubin to Mr. Sinsheimer, and then a typed copy of the Telex on the top thereof. I ask you if you can identify that as the language which you gave to Mr. Dubin to be included in the contract?

A Yes, I can identify it as such.

MR. McCONNELL: I offer Plaintiff's Exhibit 6 in evidence. I believe it's the same as one of the defendant's exhibits, but I have got my exhibits running consecutively.

THE COURT: Any objection?

MR. MALONEY: No objection.

xx (Plaintiff's Exhibit 6 received in evidence.)

Q Would you read the language, please?

A "Julius Lewis suggests the following: The present management of ISL shall operate the business during the measuring years and shall have the maximum freedom to obtain such business in a

manner which will produce in the judgment of such management, the maximum profit available consistent, however, with the overall policing of Plessey as established by the directors. Should Plessey propose any course of action which would, in the opinion of management of ISL be detrimental to profits during the measuring year, ISL management shall have the option of requiring prior to commencement of such course of action that the expenditures involved in pursuing such course be excluded from the determination of profits. Notwithstanding the foregoing if ISL profits do not average 15,000 dollars per month commencing with the third full calendar month after closing this sub-paragraph shall no longer apply and Plessey shall have the right to assume full management responsibilities. In the event, however, Plessey shall be obligated to continue the business of ISL during the measuring year in such a manner as in Plessey's judgment exercised in good faith will maximize the profits for the measuring year."

Q Now, referring to the provision "Notwithstanding the foregoing if ISL profits do not average $15,000 per month commencing with the third full calendar month after

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closing," and assuming a March closing, what is your understanding as to the period of time ISL management has to average $15,000 profits?

A The first period for measuring would be then June and July.

Q Now, was there some change in the language which you suggested and which was Telexed to Mr. Sinsheimer and the language which appeared in the second draft of the contract?

A Yes.

Q I show you Plaintiff's Exhibit 2 and ask you if you can identify that as the second draft of the contract?

A Yes, this is the second draft.

Q What is the change insofar as "Notwithstanding the foregoing," et cetera?

A Well, the changes were that it was sudden death after any month in which ISL didn't make $15,000. The average concept was deleted from the second draft.

Q So under draft No. 2, if the third month following were June and ISL management failed to make $15,000, is it your understanding that then Plessey could take over?

A Yes.

Q Now, following receipt of the second draft, did you negotiate some further changes in the agreement?

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A Yes.

Q With Plessey?

A Yes.

Q Whom did you have those discussions with?

A Well, I discussed the draft with Allan Kovar and I then discussed further changes with Seth Dubin, I think, by telephone. I do not think we met again.

Q What were those changes? Do you recall?

A There was a change about some kind of equipment which would count as producing profits.

Q Is that the cable harness?

A Yes, that was it. The average concept came back in. We discussed that, and I reported that the second draft, if I may say, would cause sudden death in any month in which the $15,000 was not made and that the proposal of Plessey was unacceptable to ISL management, and it was compromised to go back to the average concept, pretty much like my suggested language.

Q I show you what has been marked Plaintiff's Exhibit 3 and ask you if you can identify that as the final agreement?

A Yes, this is the final agreement.

Q Now, we all know that paragrapoh 5-D did not accurately express the agreement of the parties and that

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was corrected by a letter dated February 18.

Could you identify that as your letter -- that is, Plaintiff's Exhibit 4?

A Yes.

Q Would you read the provision starting with "Notwithstanding the foregoing"?

A "Notwithstanding the foregoing, if ISL profits commencing with the third calendar month of the measuring year average less than Fifteen Thousand ($15,000) U.S. Dollars per month or if there have been three consecutive months of losses during that measuring year (excluding the first two months thereof), this sub-paragraph shall nolonger apply and Plessey shall have the right to assume full management responsibilities."

Q What is your understanding as to the period of time ISL management had to average $15,000 profits under that provision?

A Meaning in calendar months?

Q Commencing when did they have to average $15,000?

A Commencing with the third calendar month.

Q How long a period of time did they have to average the $15,000?

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A Well, at least two months.

Q So that would be June and July?

A Correct, assuming a March closing.

Q And, in fact, you did close in March? Is that right?

A Yes.

Q Now, before we go to that I want to show you Plaintiff's Exhibit 9, and I ask you whether or not you can identify that?

A Yes.

Q What is it?

A It is a notice of a shareholders meeting and a proxy statement describing the Plessey transaction.

Q Would you turn to page 3 thereof and look at the description of the transaction or the agreement, the first two paragraphs.

THE COURT: By the way, did you prepare this?

THE WITNESS: Yes,sir.

MR. McCONNELL: That was my next question. Thank you, your Honor.

A You said the first two paragraphs?

Q Yes.

A I have read them.

Q You prepared this and that is your description

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of the agreement?

A Yes, sir.

Q Did that accurately describe the agreement as you understood it?

A Yes.

Q And when was that prepared?

A At the end of January, the very beginning of February.

Q And that, of course, was before there was any litigation or contemplation of litigation between the parties?

A Of course. It is before the contract was actually signed. It described the formula that was going to be signed, I thought.

Q And that was on the basis of your telephone conversations with Mr. Dubin?

A That is right.

Q I show you what has been marked and is in evidence as Plaintiff's Exhibit 5, which is the March amendment. Were those two further modifications to the agreement agreed to at the March 2 closing?

A Yes.

Q Who was present at the closing?

A Well, various people during parts of it.

THE COURT: Were you there?

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THE WITNESS: Yes, your Honor, I was.

THE COURT: Well, start with that. You were there. And where was the closing?

THE WITNESS: Parts of it were in several offices in Barbados; most of it was at Mr. Kovar's office at Scientific.

Q Was Mr. Kovar present?

A Mr. Kovar, Mr. Dubin, Mr. Albert and I were present throughout.

Q Now, what, if anything, did Albert or Dubin say with respect to these two amendments which appear on Plaintiff's Exhibit 5?

THE COURT: Well, I would like the witness to tell me in his own words what happened. How come these amendments came along at the closing? Tell us in your own words what happened.

THE WITNESS: Mr. Albert made a number of statements in the course of time we were together in Barbados, which was a several-day period.

THE COURT: You got there before March 2?

THE WITNESS: Yes, your Honor. March 2 was a Monday. I got there the previous Saturday. I went over documents with Mr. Dubin on Sunday. On Monday we made trips to various local solicitors' offices for various

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permit questions and the like. We visited two banks. So a good part of Monday was taken up with travelling around Bridgetown, and the closing finally took place on the 3rd, which was a Tuesday.

Mr. Albert was spending a good deal of time investigating the company's financial records, and from time to time would reappear to say that he had found new liabilities that he had not been told about. His implication was consistently that the financial affairs of the company were worse than he had believed before.

What that led to, among other things, was Albert's and Dubin's insistence that the company needed more than the $600,000 that the contract called for Plessey to invest, and Albert put the additional figure at $200,000. He said that Plessey would put in an additional $200,000, but that it would expect to be reimbursed at the rate of 10 per cent interest.

THE COURT: Reimbursed? You mean 10 per cent interest charged?

THE WITNESS: Charged, yes, which would, of course, make it more difficult for ISL to earn the maximum. That would be one more charge.

I resisted that. Allan made the point that he did not believe that it was necessary, that the contract

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provided for Plessey to put in whatever it wanted. The contract said at least $600,000, and it was unfair to charge interest. They remained firm in their position on that point.

They also urged that since it had been hoped that the closing would take place in February rather than March, it was taking place early in March, that we, in effect, shortened the measuring period.

A lot of those matters were stoutly resisted by us, and the argument got quite heated.

Finally, they left the room announcing they were going to telephone New York to withdraw their payment of, or their order of payment of ISL's debt to Data 100 if we didn't agree.

My client and I had a hurried colloquy and finally agreed and this amendment was then drafted.

THE COURT: You say they left to telephone New York, they came back and told you that they were not going to make the payment on the Data 100?

THE WITNESS: That they were going to withdraw the payment that we thought had already been made or had been ordered, and I think as they left we said, "Give us a little time to talk this over before you make the call."

We went into another room, talked it over,

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and agreed.

Then Dubin and I worked out this March 2nd amendment, this amendment dated March 2nd. It may have been signed on the 3rd, actually.

THE COURT: How did you and Dubin work out the amendment? You two alone with a stenographer? Is that what you did?

THE WITNESS: I think the principals were present. I am not sure.

Q What was the situation with the Data 100 loan? Will you explain that?

A Yes. Some months earlier Data 100, which is a Minneapolis-based company, had negotiated to buy ISL. In connection with that negotiation they had advanced, I think it is, $200,000 to ISL for working capital. The negotiations later broke down, and I think that money was due Data 100 at the end of January -- no, at the beginning of January, it would have been. At that point negotiations with Plessey had begun and Data 100 agreed to a short extension, my memory is 60 days.

In our negotiations with Plessey we pointed out the approaching maturity of this loan. We tried to get a further extension from Data 100 and it had been refused.

The particular importance of that was that the

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loan was secured by a pledge of the stock of the principal stockholders in ISL, so that if the loan were not paid by a date early in March when it was due, Data 100 would have a right to foreclose on that pledge and thus own most of the stock of ISL, and they indicated they intended to adhere strictly to that agreement.

Q You indicated in your testimony that you and Kovar resisted stoutly these requested amendments. What caused you to cave?

A The threat that Plessey woule refuse to close, that the Data 100 loan pledge would be foreclosed, that we would, therefore, be left with a company that could not run without money, it was broke, and that the principal holders of shares in the company wouldn't even own the stock in it.

THE COURT: Are you saying there were two reasons: one was Data 100 foreclosing on the stock, and the other reason was the financial condition of ISL?

THE WITNESS: Yes.

THE COURT: There are really two reasons?

THE WITNESS: They are inter-dependent.

Q I show you what is in evidence as Plaintiff's Exhibit 26, which is the Sinsheimer assumption of management letter dated June 9, 1970, and I ask you if that came to

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your attention?

A Yes.

Q Did you have occasion to meet with the ISL directors as to what response should be made to Mr. Sinsheimer?

A Some of the directors, yes.

Q Was there any discussion as to whether or not even under the March 2 amendment, the takeover of management by Plessey was premature?

A Yes.

Q Was it your understanding at the time that the takeover was in fact premature?

A It was.

Q I show you what is in evidence as Plaintiff's Exhibit 27 and ask you if you had anything to do with the drafting of that instrument?

A Yes, I did a preliminary draft.

MR. MALONEY: I believe that would be Defendant's Exhibit AH and AS in evidence.

Q I show you what is in evidence as Defendant's Exhibit AS and ask you if that is your draft letter?

A Yes.

Q Would it be fair to say that the first page of the letter is substantially your work product, the June 17

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letter?

THE COURT: I don't know what "substantial work product" means. You were asked to prepare a draft of the letter and you prepared that draft?

THE WITNESS: Yes.

Q Is that draft the first page of Mr. Carlen's letter to Sinsheimer, Plaintiff's Exhibit 26?

THE COURT: I don't know whether the witness has to read all of that.

MR. MALONEY: He can read it overnight and agree whether or not it is.

MR. McCONNELL: The second page has the remarks added by Mr. Carlen.

THE COURT: Why make him compare?

MR. McCONNELL: I agree.

Q Would you read the third full paragraph of Plaintiff's Exhibit 27?

A "The directors will look to Plessey Incorporated as trustee of the rights of Scientific Holding Company under the February 2nd agreement. The directors know and will expect that the good faith management of ISL by Plessey Incorporated will entail the production of the maximum profit available during the 12-month period ending March 31, 1971. To this end the directors have the confidence and

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will expect to make available to them a complete monthly accounting of all ISL activities, sales, expenses, and such other information as would be necessary or desirable for them to determine whether in their opinion any course of action or expense is detrimental to attaining the profit goal."

Q Was it your understanding that under the agreement upon takeover of management by Plessey your obligation was to maximize profits during the measuring year?

A Yes.

Q Was there any discussion among the directors whether or not to bring a lawsuit at that time against Plessey?

A Yes.

Q And why the letter instead of the lawsuit?

MR. MALONEY: I object to that, your Honor, till we have some testimony from the witness that there were alternatives.

THE COURT: I think I will sustain the objection to that.

Q Why was the decision not to bring the lawsuit at that time?

A It was thought a more concilliatory approach might very well succeed and, obviously, would be a lot

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cheaper.

MR. McCONNELL: That is all.

MR. MALONEY: Your Honor, did I understand that we are recessing at 3 o'clock?

THE COURT: Yes.

MR. MALONEY: I don't think I could possibly finish.

THE COURT: Do what you can.

CROSS EXAMINATION

BY MR. MALONEY:

Q Mr. Lewis, I show you Defendant's Exhibit G in evidence, your letter dated February 4, 1970, from Data 100 to International Scientific, Ltd., and ask you if you recognize that document?

A Yes.

Q Do you recall when you first saw a copy of that document?

A I don't recall the exact date. Probably quite soon after the document was mailed to Mr. Kovar.

Q Do you recall who obtained the extension described in that letter from Data 100?

A I think I helped. I had some telephone calls with their lawyer.

Q Does that refresh your recollection as to the date

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on which the Data 100 loan was originally due?

A This letter doesn't give the exact date. It must have been around February 1st.

Q Is it your recollection that that loan was definitely due before the agreement was signed on February 4, 1970?

A Yes, I would suppose so.

Q Do you have any doubt about that, Mr. Lewis?

A I can't tell the exact due date. It was very close to the beginning of February.

Q I will show you Defendant's Exhibits CH, CF and CG in evidence and ask you whether using those documents you can refresh your recollection as to when the Data 100 loan was due before you obtained the 30-day extension?

A Yes, it looks like January 31.

Q Now, under the terms of the February 4 letter -- what exhibit number is that -- is that Defendant's Exhibit G -- under the terms of that 30-day extension when would the Data 100 loan have become due?

A March 6, I think.

Q Mr. Lewis, I show you Defendant's Exhibit B in evidence, which is the Telex from Sinsheimer to Mr. Dubin, and I show you Defendant's Exhibit P, which is the Telex from Mr. Dubin to Mr. Sinsheimer on the prior day.

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A That is the one I read out loud?

Q Yes. Now, would you compare the two documents and tell me if Mr. Sinsheimer made any changes in the last sentence of proposed paragraph 5-D?

A Yes.

Q What was that change?

A The words "during the measuring year in such a manner as in Plessey's judgment exercised in good faith shall maximize the profits for the measuring year" were deleted.

Q Mr. Sinsheimer took those words out?

A Yes.

Q Would you read me the last sentence in Mr. Sinsheimer's Telex?

A "In such event, however, Plessey shall be obligated to continue the business of ISL during the measuring year in good faith."

Q Now, do you ever recall any discussion with Mr. Dubin concerning the deletion of the words concerning maximization of profit from the last sentence of paragraph 5-D?

A I don't recall.

Q Do you recall when you first realized that the words in the first Telex concerning maximization of profits had been removed from the last sentence of paragraph 5-D?

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A Probably when I saw the second draft.

Q When you saw the second draft did you request that Mr. Dubin put your language concerning maximization of profits back into paragraph 5-D?

A I don't remember. I probably did, but I don't remember.

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T3 Q Is it your recollection that those words were not placed back in paragraph 5D either in your letter of February 18, 1970, or in the March 2nd agreement?

A May I look at the document?

Q Sure. Do you have the February 18th letter there, Mr. Lewis?

A Yes.

Q How about the March 2nd amendment? I think Mr. McConnell may have given you a copy of both.

A They are omitted in both.

Q So, in the final agreement, as well as in the amendment on March 2nd, there is no language concerning maximization of profits in the last sentence of paragraph 5D?

A That is right.

Q Now, what situation was the last sentence of paragraph 5D intended to cover?

A It was intended to cover the manner in which Plessey was agreeing to operate the business if it took over management.

Q You recall no discussion with Mr. Dubin concerning whether or not the removal of your words concerning maximization of profit from that last sentence had any legal significance?

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A I don't remember the discussion or if there was one.

Q In connection with the telex for which you supplied the language, Defendant's Exhibit P, were you and Mr. Dubin sitting together in the same room when that language was prepared?

A I am pretty sure I remember bringing that language with me to our meeting in New York.

Q And your language was transferred into the telex to Mr. Sinsheimer?

A I didn't have anything to do with the telex. I gave Dubin a draft of -- I had brought along language. Whether Dubin and I then discussed it and modified it before this telex was sent, I don't remember.

Q Do you still have a copy of what it is you brought along to the meeting with Mr. Dubin?

A You mean just the draft of that language?

Q Of that one paragraph.

A No, I don't think I do.

Q In connection with preparing that language, what did you say to Mr. Dubin and what did he say to you concerning what the language was intended to mean?

A Which language are we talking about, the whole paragraph?

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Q Let's just take the third sentence, the next to the last sentence concerning the $15,000 profit.

A It was intended to mean that once the first two-month period had passed, during which losses were not to count, although profits were, existing management of ISL had a right to try over an initial two-month period and then thereafter, if they were successful in that two-month period, to earn an average of $15,000 per month. As long as they maintained that average they kept management control of the company throughout the measuring year.

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Q Did you say that to Mr. Dubin?

A Oh, I am sure that we talked about various examples of how it would work out, yes.

Q It is your recollection that you specifically discussed with Mr. Dubin that this would give the company the right to average profits in June and July?

A Yes.

Q Do you recall when you received the second draft of the contract?

A Very near the end of January.

Q That second draft included the language which Mr. Sinsheimer had sent back in his telex; is that correct?

A I don't know if it is identical, but in substance. It had the $15,000 per month concept in it, yes.

Q When you received that, do you have any recollection of calling Mr. Dubin to ask him why Mr. Sinsheimer had changed the language?

A I don't think I needed to ask him that.

Q Did you speak to Mr. Dubin concerning the change?

A Yes, I told him it was unacceptable.

Q Do you recall what date that was on?

A No, sir.

Q Do you recall if it was before or after the board of directors' meeting on January 30th?

A I am almost certain it would have been before.

Q Where were you at the time physically when you called Mr. Dubin?

A I went back through my time sheets, through my diary, and I think I may have been in California at that point. I was either in Chicago or I was in California.

Q During that telephone conversation did you ask Mr. Dubin to change the language of paragraph 5D?

A Yes, among other changes, I did ask for that.

Q Do you recall what words you told him should be put into paragraph 5D in place of the language that is typed in the second draft?

A Not exactly, but I wanted the average concept back in there.

Q Did you have the language written down in front of you when you called Mr. Dubin?

THE COURT: Whose language, his language?

MR. MALONEY: Yes, Mr. Lewis' language.

THE COURT: Did you write something out on a piece of paper and then over the telephone tell him that this was my suggestion as to the language, Mr. Lewis, if you remember?

THE WITNESS: It is very likely, but I can't say for absolute, sir.

Q Have you reviewed your files to see whether or not you could find any such piece of paper?

A I have looked through my files. I didn't find it, no.

Q So, you gave Mr. Dubin some language over the telephone which he agreed to incorporate in the final agreement; is that correct?

A Yes.

Q That would be the agreement signed on February 4th, which was incorrect, paragraph D was incorrect in that agreement?

A That is right.

THE COURT: I think at this point we will adjourn for the day. I have some other matters.

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Ladies and gentlemen, we will meet again tomorrow at 10 o'clock. I have some matters early in the morning, but I am going to try very hard to be through before. I would be grateful if you would be there at 10 and if I am a few minutes late, if you will forgive me and I hope you will.

Please remember not to discuss this case with anyone in the meantime.

I hope you have a nice evening and I look forward to seeing you tomorrow morning at 10 o'clock.

(Adjourned to March 13, 1974, at 10 A.M.)

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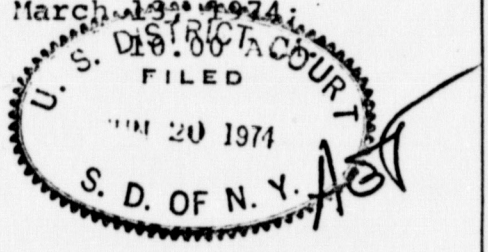
SCIENFIFIC HOLDING COMPANY, LTD.
vs. 72 Civ. 4040
PLESSEY INCORPORATED.

New York, March 13, 1974;
10:00 A.M.



Trial resumed.

- -

THE COURT: Good morning. Thank you very much for your promptness.

MR. McCONNELL: Your Honor, Mr. Lewis is not around and there is further cross of Mr. Lewis.

THE COURT: Here he is. All is well. We can continue.

J U L I U S L E W I S, resumed.

CROSS EXAMINATION CONTINUED

BY MR.MALONEY:

MR. MALONEY: Good morning, Mr. Lewis.

THE WITNESS: Good morning.

Q Mr. Lewis, I show you a copy of Defendant's Exhibit K in evidence. I ask you if you recognize that as a copy of the second draft of the agreement?

A Yes, I do.

Q Would you turn to paragraph 10-E. Paragraph 10 starts on page 10 of the draft. It says ISL represents and warrants, and going over to page 12, "Since December 31,

1969, there has not been," and sets forth the paragraph.

What was your understanding of that provision in the agreement?

A It's a representation that there has been no change between December 31, 1969, and the date of the contract, outside of the ordinary course of business, no adverse change.

Q Well, what period of time would that provision be intended to cover?

A The period between December 31, 1969, and the date of the signing of the agreement.

Q Would that provision also cover the period from the date the agreement was signed until the date of closing?

A Well, to be technical, not that provision. There is another provision that does that.

Q What provision of the contract is that? Would that be paragraph 13-B on page 19 of the draft?

A 13-B, yes.

Q That reads: "ISL's representations and warranties contained in this agreement shall be deemed to have been made again as of the time of the closing and shall then be true in all material respects and ISL shall have performed and complied with all agreements required by this agreement to be performed or complied with no later than closing."

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A That is right.

Q Now, what effect would that have on paragraph 10-E?

A It would mean that paragraph 10-E would have to be correct as of the closing or Plessey would have a way of refusing to perform.

Q So if paragraph 10-E was not correct as of March 2nd, Plessey did not have any obligation to close the transaction? Is that correct?

A Well, I think if it were materially incorrect, that is true.

Q What was it that had to be true under paragraph 10-E by the time of the closing on March 2nd?

A That there will be no change in ISL's financial condition, assets, liabilities or business, other than changes in the ordinary course of business.

Q Is there further language providing how the parties defined what would be considered a change in ISL's financial condition or assets?

A Yes.

Q What was that provision?

A That operating losses not in excess of dollars blank for the period from December 31, 1969, to the closing shall not constitute an out of the ordinary change.

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Q Do you recall whether or not had discussed that provision with Mr. Kovar before the final agreement was signed on February 4, 1970?

A Yes, I am sure I did. It was changed.

Q Did you explain what that paragraph meant to Mr. Kovar?

A Well, Mr. Kovar is a lawyer; I doubt that I needed to.

Q Do you recall whether or not you did, whether or not Mr. Kovar is a lawyer?

A I don't recall.

Q I show you a copy of Plaintiff's Exhibit 3 in evidence, which has been identified as the final agreement, and I would ask you to turn to the same paragraph in the final agreement.

A I have it.

Q Now, by the time the agreement was signed on February 4, 1970, had the parties agreed to the amount of money which should be filled in the blank in the second draft, Defendant's Exhibit K?

A Yes, but the language of that sentence was changed.

Q How was it changed?

A In the original, in the second draft, the provision

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was operating losses for the whole period from December 31, 1969, until the closing. In the final contract it was an amount per month, $20,000.

Q So in the final agreement it reads operating losses not at a rate in excess of $20,000 per month for the period from December 31, 1969, to the closing hereof shall not constitute an out of the ordinary change of ISL's condition?

A That is correct.

Q Do you recall how the parties arrived at the figure of $20,000 per month?

A No, I don't recall.

Q Do you recall whether there were any negotiations with Mr. Dubin concerning what the amount of that provision would be?

A There must have been. I don't recall the conversation.

Q Do you recall any discussion with Mr. Kovar concerning the amount that should be used for the monthly rate?

A Again, there must have been. I don't remember the conversation as such.

Q Well, unless you obtained the figure from Mr. Kovar, was there any other source from which you could have

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made some determination as to what the amount should be in that paragraph?

A No.

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T2 Q Does that refresh your recollection that you must have discussed it with Mr. Kovar in order to arrive at that amount?

A Yes, I said that.

THE COURT: I think he said he discussed it, but he doesn't remember the details, when and where; is that right?

THE WITNESS: Yes, your Honor.

Q Do you recall when you would have discussed it with Mr. Kovar?

A Well, it must have been right at the end of January and the very beginning of February when we were getting this final agreement together.

Q Do you recall that Mr. Dubin had wanted to place a lower figure in that paragraph?

A No.

Q But, in any event, Mr. Kovar agreed to use the figure of $20,000 per month for purposes of paragraph 10-E-1?

A Yes, he signed the contract.

Q Do you recall whether there was any discussion of that provision at the closing on March 2nd?

A No, I do not recall a discussion.

Q Going back to the first sentence of paragraph

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10-E-1, it says:

"Any change in ISL's financial condition, assets, liabilities or business, other than changes in the ordinary course of business, the sale of the property which has been the residence of E. Allan Kovar and the writing off of approximately $20,000 of testing equipment ..."

Do you recall what the sale of property was that was referred to there?

A Yes, I do.

Q What was that?

A The company owned a house on Barbados where Mr. Kovar had been living.

Q That was not to be included -- if that house was sold, that was not to be included in any way in the calculation to be made under paragraph 10-E-1?

A That was not to be viewed as a change out of the ordinary course; that is right.

Q And the writing off of approximately $20,000 U.S. dollars of testing equipment, do you recall what that referred to?

A Obviously -- I don't specifically recall, but I think it explains itself.

Q Do you recall any discussion in which Mr. Kovar

asked you to exclude any other kind of item from the calculation that should be made under paragraph 10-E-1?

A I don't recall any.

Q Do you recall Mr. Dugan ever refusing to exclude any other item from paragraph 10-E-1?

A No.

Q Just two further questions on the Data 100 loan, Mr. Lewis.

Between February 4, the date of Defendant's Exhibit G, the 30-day extension letter we discussed yesterday --

A Yes.

Q -- and March 2nd, the date of the closing, do you have any recollection of Data 100 sending any further written communication shortening that 30-day period?

A No.

Q Do you recall any telephone conversation with any person at Data 100 concerning shortening that 30-day period?

A No, I am sure there was no such conversation; not with me.

THE COURT: As far as you are concerned?

THE WITNESS: Yes, sir.

THE COURT: Right.

Q I believe we established in your testimony

yesterday that under the original agreement with Data 100 and the termination and before you obtained the 30-day extension the loan was due on or about January 31?

A That is right.

Q Was it your understanding that as of January 31 Data 100 had a right to take the stock, which had been pledged by the officers of the company, to satisfy the loan?

A Yes.

Q Did you discuss that with Mr. Dubin by any chance?

A Oh, indeed.

Q So, Mr. Dubin was completely aware that as of January 31 Data 100 could seize the stock of the officers of ISL in satisfaction of the loan?

A Well, I am sure he must have been aware of it. In the month of February, after the contract was signed, we made arrangements to repay -- for Plessey to repay the Data 100 loan simultaneously with the closing.

Q Do you recall whether or not you discussed the Data 100 loan with Mr. Dubin before the contract was signed on February 4?

A I don't recall.

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eoh 1 Lewis-cross

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Q Looking at Plaintiff's Exhibit 3, the agreement signed on February 4, 1970, Mr. Lewis, would you turn to paragraph 7?

A I am there.

Q Now, I notice that when the agreement was typed the date of closing was left blank and then someone wrote in March 2, 1970.

A That's right.

Q To the best of your recollection had that date been filled in as of February 4, 1970, when the contract was signed?

A I am quite it had not.

Q You are quite sure it had not?

A Right.

Q But Mr. Kovar signed the contract while it was still blank?

A Yes.

Q Do you recall when it was filled in?

A Probably on March 2nd.

Q On March 2nd?

A Probably.

Q Up to February 4, 1970, had you had discussions with Mr. Dubin concerning the date on which the closing would take place?

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A Up to and after, yes.

Q As of February 4th, what was the understanding of the parties as to when the closing would take place?

A As soon as possible and it was hoped to take place before the end of February.

Q Once a date was filled in in paragraph 7, Mr. Lewis, did Plessey have any right to require that the closing take place earlier than that date under the agreement?

A I am not sure I understand that question. Once what was filled in?

Q Once the date March 2nd was filled in on the agreement of February 4, 1970.

A Yes.

Q And the parties had agreed to that date?

A Yes.

Q Under paragraph 7 did Plessey have a right to require that the closing take place earlier than that date?

THE COURT: I don't know what that proves. As I understand the witness' testimony, the date was open and the parties were working to have it closed at the earliest date and that turned out to be March 2nd and you think that somebody wrote the date in at the time of the closing?

A That is exactly so, your Honor.

THE COURT: I don't see the relevance of that

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question.

MR. MALONEY: I withdraw the question at this time, your Honor.

Q When was it finally decided that the closing would be held on March 2nd, Mr. Lewis?

A I don't think there is any specific date that that was decided, Mr. Maloney. There were a great many things to do to prepare for the closing. We agreed to meet in Barbados the weekend before the 2nd to try to get everything done as soon as possible and to close on the 2nd, if possible.

We actually didn't close on the 2nd.

Q By February 18th were you and Mr. Dubin still hopeful that the transaction could be closed in February?

A I don't remember.

Q I believe you testified yesterday that you arrived in Barbados on Saturday, is that correct, or that you were there on Saturday?

A I think I arrived on Friday night, actually.

Q Do you recall when Mr. Dubin arrived?

A I am reasonably sure it was Saturday afternoon.

Q Do you recall when Mr. Albert arrived?

A I really don't. I think it was later, but I am not sure.

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Q You say you spent Sunday going over the documents with Mr. Dubin?

A That's right.

Q Now, on Sunday did Mr. Dubin request any amendments to the contract?

A No, not to my recollection.

Q Did he say anything that would have made you indicate that there would have been changes requested by Plessey in the contract?

A No, I don't believe he did.

Q Do you recall having dinner on Sunday night with Mr. Kovar and Mr. Dubin and Mr. Albert?

A I had dinner with them more than one night.

THE COURT: He is talking about Sunday night, I take it, do you remember that?

THE WITNESS: I was trying to explain that I am not sure which night it was. We did have dinner together one night and it may very well have been Sunday.

Q Do you recall if Mr. Albert had arrived in Barbados by Sunday night?

A Yes.

Q Had you seen him on Sunday night, whether at dinner or otherwise?

A Yes, he was staying at the same hotel, as I recall.

Q On Sunday night did Mr. Albert say anything to you concerning any amendments or changes to the contract?

A No, I don't believe so.

Q What happened Monday morning?

A I cannot give you a chronological account of the events of that day under oath. I can tell you some of the things that happened, but I really don't remember the order they happened in.

Q I believe you testified yesterday that there were some trips to the banks and to the solicitor's office, the solicitors would be what they call lawyers in Barbados.

A Yes.

Q And to some government agencies in connection with taking care of some licenses?

A I don't remember any government agencies, but maybe there was one.

Q Was that done before or after you went to the offices of ISL?

A We may have stopped at the offices of ISL before we went into town.

Q Had either Mr. Dubin or Mr. Albert said anything about amendments up to that time?

A Not to my recollection.

Q Now, I was a little confused yesterday about

where the Data 100 loan was to be paid and how it was to bepaid. What was your understanding of the arrangements that Mr. Albert had made for payment of the Data 100 loan?

A He had arranged, as I recall, to have a New York bank, I don't remember which one --

Q Was that the First National City Bank?

A It may well have been. It was either that or Chase, I don't remember.

Q Was the First National City Bank the bank that had lent the $200,000 secured by Data 100?

A I don't remember -- was that the form of transaction? I really don't remember it.

Q Did the bank in New York, which was going to make the payment, have a branch in Barbados, Mr. Lewis?

A Yes.

Q Were you present when Mr. Albert made the arrangements to have the $200,000 either sent to New York or released in New York to repay the Data 100 loan?

A I don't remember if I was present. I either was or I was told about it immediately.

Q Was it your testimony yesterday that Mr. Albert had made those arrangements before he requested any amendments or changes in the contract?

A Yes, if it wasn't yesterday, it is today.

Q I think you also testified that when the subject of the amendments came up Mr. Albert left the room telling you that he was going to call to stop the payment on the loan?

A Both Mr. Albert and Mr. Dubin at least started out of the room to do that.

Q That was before any of the closing documents had been signed and exchanged?

A I don't remember that. The closing documents had been gone over on Sunday. They were in reasonably good shape from then on.

Q Before Mr. Albert arrived in Barbados, do you have any reason to believe that he had already decided to request amendments to the contract?

A No.

Q Was it your understanding that Mr. Albert's request for changes in the contract was based on what he learned when he arrived in Barbados on or about March 1st or 2nd?

A Yes.

Q He wouldn't have arranged to have the Data 100 loan paid for before he came to Barbados if he knew he was going to ask for amendments and did not yet know

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whether or not there was going to be agreement to those amendments, would he, Mr. Lewis?

MR. McCONNELL: I object to the form, your Honor.

THE COURT: I think I will sustain the objection to form. That is very iffy. What this witness thinks somebody else might do. I think I will sustain the objection to that.

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Q Now, when Mr. Albert brought up the subject of the business needing $200,000 more than he had thought, do you recall what he said about that?

A I don't recall his words, no.

Q Well, do you recall him saying that he was learning for the first time on March 2nd that that additional $200,000 would be needed?

A Again, I don't remember if he used those words. That was certainly the message he was trying to convey.

Q The message he was trying to convey is that based on what he learned in Barbados on March 2nd the business would need an additional $200,000?

A I don't know when he learned it, Mr. Maloney.

Q Did he say anything in your presence about when he learned it?

A Yes, but I am not sure if the learning process all happened in those few days. He had made an earlier trip. I don't know when. But I think he was there earlier in February.

Q Well, do you recall either yourself or Mr. Kovar saying to Mr. Albert, "How come you didn't know this based on your earlier trip?"?

A No, I dont recall.

Q I show you Defendant's Exhibits S, R and AZ

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and I ask you if you can identify any of those documents?

A I have two copies of the same thing.

Q I hope not. Yes, there may be extra copies attached to each one.

A I can see what they are labeled.

Q Well, do you have any recollection of seeing any of those documents at the closing on March 2nd?

A I remember the one with Hourihan's signature on it.

Q Which one would that be?

A Defendant's Exhibit AZ.

Q Is that the financial statement for the year ending December 31, 1969?

A Yes, sir.

Q Was that delivered at the closing to Mr. Dubin and Mr. Albert?

A Yes, it was being made up right while they were there.

THE COURT: What do you mean by that? The figures were being written down or what?

THE WITNESS: Yes, that is what I mean. It was being put in final form and it was actually discussed by them.

THE COURT: By Mr. Hourihan?

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THE WITNESS: And by Mr. Kovar.

Q Do you recall seeing either of the other exhibits at the closing?

A No, not as such.

Q Can you identify what those documents are for the jury that we are discussing?

A One is a statement of the profit and loss, and a statement of variable and fixed expenses, engineering expenses, some other kinds of expenses, all for the month of January, 1970.

THE COURT: That is Exhibit S?

THE WITNESS: Yes.

Q And what is Exhibit R?

A It is a balance sheet as at March 1, 1970.

Q Does that include a profit and loss statement for the months of January and February, 1970?

A I see one for February.

Q Statement of profit and loss for the month of February and for the year to date?

A Yes.

Q Do you recall what fiscal year basis ISL was on under this accounting system? Was it a calendar year, Mr. Lewis, from January to December?

A I think so, but I really don't remember.

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MR. MALONEY: I think that that has been established.

MR. McCONNELL: I don't know whether it has been established, but there is no dispute about it; it is the fact.

Q So on Defendant's Exhibit R when it says year to date, that would include January and February? Is that correct?

A That is correct.

Q You do not recall whether or not you saw either of those statements at the closing on March 2nd?

A eo, I don't recall.

Q Do you recall any discussion of the amount of money that ISL had lost for the months of January and February, 1970, at the closing?

A Well, I honestly don't remember it put that way. There was certainly discussion of greater liabilities than Mr. Albert had expected, which I assume would relate to loss.

Q Well, was there any discussion as to whether or not ISL was in compliance with paragraph 10-E of the agreement?

A No claim was made that it wasn't.

Q Do you recall whether there was a discussion of

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it?

A A discussion of what?

Q Of the amount of money which ISL had lost in the months of January and February.

A I told you I don't remember.

Q Were you present during any discussion in which Mr. Kovar claimed to either Mr. Albert or Mr. Dubin that the $74,000 loss shown on Exhibit R was not the correct figure for making a determination under paragraph 10-E of the agreement?

A I don't remember such discussion.

Q I believe your testimony yesterday was that at some point in the day when you got back to the offices of ISL Mr. Albert said that he would need $200,000 more based on the liabilities he was finding? Is that correct?

MR. McCONNELL: I am going to object to the form.

THE COURT: I think I will sustain the objection.

But he did come and say to you he thought they needed $200,000 more in the business? Is that correct?

THE WITNESS: Either he or Mr. Dubin.

THE COURT: You are not sure which one said that?

THE WITNESS: No.

THE COURT: Did they indicate why they needed $200,000?

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THE WITNESS: Yes.

THE COURT: What did they say?

THE WITNESS: That Albert had found additional bills that he thought should be paid.

Q These were bills that he had not seen on his prior trip to Barbados?

THE COURT: I don't know how he knows that.

Q Well, did Mr. Albert say anything about whether or not these additional bills that he was finding were bills that he had not been told about on his first trip to Barbados?

A He didn't say that. He certainly implied that he was finding additional bills.

Q Now, were both amendments requested before Mr. Albert and Mr. Dubin left to make the telephone call to stop the payment on the Data 100 loan?

A Oh, yes, I am sure they were.

Q And what reason was given for the amendment shortening the management provision?

A Basically, that everyone had expected that the transaction would close in February, that for whatever reasons it had been delayed a few days until March. I think that really was the reason.

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Q Well, by February 18 had any closing date earlier than March 2nd been established or tentatively agreed upon by the parties?

A Not to my recollection.

Q On February 18 when Mr. Dubin agreed to put the language concerning management control in the contract which you had requested, we were half-way through the month of February, weren't we, Mr. Lewis?

A Yes.

Q Is it your position that at the closing --

THE COURT: He hasn't got any position. Ask him for his understanding.

Q Is it your understanding that the only reason why Mr. Dubin asked for a change in the management control position 12 days later on March 2nd was that the closing hadn't taken place in February?

A That is all I recall being said on the subject, Mr. Maloney.

Q Do you recall any discussion between Mr. Albert and Mr. Dubin and Mr. Kovar about what Mr. Albert had been told the loss for the company would be for the year December 31, 1969, before the contract was signed on February 4?

A I am not sure I follow that. I am sorry.

Q Well, at any time during the closing did Mr. Albert say to Mr. Kovar, "Allan, when we signed the agree-

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ment on February 4, you told us that the losses for 1969 would only be around $200,000"?

A I don't remember any such statement.

Q Do you remember Mr. Albert and Mr. Dubin saying that because that loss had increased from 200,000 to $400,000, Plessey did not believe it was obligated to close the transaction?

A I certainly do not recall any such statement.

Q Do you recall Mr. Albert and Mr. Dubin leaving the room at any time to talk to Mr. Sinsheimer in New York?

A They left the room lots of times. I don't recall being told they were going to try to call Mr. Sinsheimer. It's possible.

Q Did they say at any time during the closing that they were having telephone conversations with Mr. Sinsheimer concerning whether or not they should go forward with the contract?

A Not to my recollection, no.

Q Did they ever tell you that Mr. Sinsheimer wanted to call the transaction off entirely because of what Mr. Albert found out on March 2nd in Barbados?

A They certainly didn't.

Q Did Mr. Albert or Mr. Dubin ever say during the closing that they wanted to call the transaction off

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entirely, that they didn't want to proceed with the closing?

A Yes, when they got up to leave the room to cancel the Data 100, that is what they implied.

Q They were implying if you didn't agree to the two amendments they were requesting they would not close the transaction?

A Yes, that is certainly what I understood.

Q Now, after the two amendments had been agreed on, did a further dispute then arise as to whether or not Plessey would proceed with the closing?

A There was another dispute which I think was simultaneous.

Q What was the other dispute?

A The place of payment -- is the sum $180,000 -- I think it is.

Q What was the nature of that dispute?

A Although, as I recall the contract, ISL had no right to require a payment outside of Barbados, we requested that such payment be made so that the payment would not be subject to Barbados exchange control laws.

Q What did Mr. Albert respond to that?

A Well, either Mr. Albert or Mr. Dubin or both responded no.

Q Did they give a reason why they would not agree

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to have the money paid in New York or in the United States?

A Yes, I think so.

Q What was the reason which they gave?

A It was to the effect that that might get them into difficulties with the Barbadian Government. Whether it was breaking the law or earning ill will, I no longer remember.

Q Were you able to tell Mr. Albert or Mr. Dubin whether or not itwould have been legal in Barbados to pay the money in the United States?

A No, sir.

Q Was there anyone at the closing who was not able to give them that answer?

A Well, I think Mr. Kovar had some fairly good understanding of those regulations.

Q Was there any attorney in Barbados from whom you obtained an opinion on March 2nd or March 3rd as to whether or not it would have been legal for Plessey to pay the $180,000 in the United States?

A A Barbadian attorney was present for a part of the closing.

Q Did he express an opinion on that issue?

A I really don't remember, and I am not sure that he was asked.

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THE COURT: That was not something you asked any of these solicitors?

THE WITNESS: I dont remember doing so, your Honor, no.

Q Are you sure when Mr. Albert left the room to telephone New York to stop the payment on the Data 100 loan, that threat was in connection with the fact that Mr. Kovar was insisting that the $180,000 be paid in Barbados?

A Am I sure that it was in connection with that?

MR. MALONEY: Well, let me withdraw the question.

THE COURT: I think your question is, what was the stumbling block which led Mr. Albert to say he was going to leave the room and call up New York and stop the payment of the Data 100 loan.

Is that it?

MR. MALONEY: Yes.

A My recollection is that it was the two provisions embodied in the March 2nd amendment; the place of payment couldn't have been such a cause, because we had no legal right to require payment in New York, so we couldn't have been insisting on it.

Q Well, you had no legal right, but Mr. Kovar was asking that it be done, wasn't he?

A That is quite different, yes, he was asking that

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it be done.

Q Does it refresh your recollection that Mr. Albert had not given any instructions that the Data 100 loan be paid until after the two amendments had been agreed to?

A My memory is exactly contrary to that.

Q And then after that happened, that dispute about the $180,000 arose and Mr. Albert left the room again to try to stop that payment from being made because Mr. Kovar was making an illegal demand?

THE COURT: Wait a minute. I don't know about the illegal demand. Strike that part.

MR. MALONEY: Strike the word "illegal."

Q -- was making a demand that the money be paid in Barbados rather than in the United States?

A My memory is exactly contrary to that.

Q As of March 2nd, Mr. Lewis, do you recall whether ISL was in compliance with the warranties and representations contained in paragraph 10 of the agreement?

A I made no real investigation of that. No claim was made by Plessey that ISL was not in compliance. Certainly, some of the things Mr. Albert said could have been taken as implications that ISL was not in compliance.

Q Well, if as shown on Defendant's Exhibits S and R,

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ISL had lost $74,000 in the months of January and February, was ISL in compliance with paragraph 10-E as of March 2nd?

MR. McCONNELL: I object to that, your Honor. The figure $74,000 appears on the exhibits.

THE COURT: I think I will let the witness answer that, if the losses for January and February were in excess of this figure in the contract, would that have been in breach of the contract?

MR. McCONNELL: Your Honor, if I may, I think it has to be operating losses.

THE COURT: Fair enough, operating losses.

THE WITNESS: That is the answer, that if operating losses exceeded $40,000 for the period.

Q Then ISL would have been in violation of the contract?

A Yes, that is correct.

Q And Plessey would not have been obligated to close?

A I am not going to give you an opinion on Plessey's legal remedy if ISL was slightly out.

THE COURT: I am glad you are not. But what it really amounts to, this would not be losses incurred in the ordinary course of business; this would be more than ordinary course of business?

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THE WITNESS: That is certainly correct, your Honor.

Q I think you said yesterday, Mr. Lewis, that when Mr. Albert and Mr. Dubin demanded these two amendments, you asked for time to discuss it with Mr. Kovar privately?

A Yes.

Q What was the substance of your private discussion with Mr. Kovar?

A Well, we discussed whether Albert and Dubin were bluffing in their insistence on these amendments, and we concluded that we could not afford to call their bluff, because if they were not all we would have been left with is a bankrupt company and a lawsuit that we had no money to finance. So we decided we had to accede to their demands.

Q Do you recall whether this discussion took place on March 2nd or March 3rd?

A I honestly don't recall. I think it was the 3rd, but I am not sure.

Q You mean the amendments had not been requested until the morning of March 3rd?

A I don't think they were requested in the morning at all. My memory is it was during an afternoon. Whether it was the afternoon of the 2nd or the afternoon of the 3rd, for the life of me I can't recall, Mr.

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Maloney.

Q But you think it was the 3rd, rather than the 2nd?

A Yes, I do.

Q Well, in addition to discussing whether Albert and Dubin were bluffing, was there any other discussion during your private discussion with Mr. Kovar about whether or not he had authority to sign the amendments they were demanding?

A There was some discussion on that subject, yes.

Q Can you tell us what you said to Mr. Kovar and what he said to you?

A Not word for word, no. I can't tell you what I think the substance was.

Q Will you tell us what the substance was?

A I think we both had serious doubts that Mr. Kovar had authority to agree to the amendments.

Q Both of the amendments? Or just one of the amendments?

A Both.

Q So you and Mr. Kovar had doubts about whether or not he had authority to agree to either of the amendments?

A That is correct.

Q Were you present in the courtroom yesterday when Mr. Carlen was testifying?

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A During the latter part of his testimony.

Q Did you hear his testimony when he said that he thought Allan Kovar had authority to agree to the amendment governing the additional $200,000 and the 10 per cent interest?

A Yes.

Q So you don't have any doubts as you sit here today about whether or not Allan Kovar had authority to agree to that amendment?

A Yes.

Q You still have doubts?

A Yes. Mr. Carlen isn't a lawyer.

Q Mr. Carlen is a member of the board of directors?

THE COURT: I think that is being argumentative. He says that Carlen might think it was all right, but he had doubts about it.

THE WITNESS: That is right.

Q Now, following your private discussion with Mr. Kovar, what did you say to Mr. Dubin concerning your doubts about Mr. Kovar's authority to sign the amendments?

A I don't remember saying anything to Mr. Dubin about it.

Q You didn't raise this question with Mr. Dubin?

A No. I discussed this subject with Mr. Kovar,

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and he has reminded me that he told Mr. Dubin that he doubted he had authority. I remember having had that discussion with Mr. Kovar.

Q You remember having the discussion with Mr. Kovar, but were you present when Mr. Kovar told Mr. Dubin that he lacked authority?

A Yes.

Q But you and Mr. Dubin didn't discuss the question?

A No, I don't remember such discussion at all.

Q Did you discuss it with Mr. Albert at all?

A No, I am sure I didn't.

Q Mr. Lewis, I believe you have the February 18 letter, Plaintiff's Exhibit 4, in front of you?

A Yes.

Q I show you Plaintiff's Exhibit 5 in evidence, which has been identified as the March 2nd amendment.

Now, referring to the language concerning the $15,000 profit and referring to Exhibit 5, skipping over the part that we have heard about quite frequently during the trial, about the $15,000 per month, starting with the words "or if there have been three consecutive months of losses during that measuring year (excluding the first two months thereof)," what was your understanding of the situation to which that language was intended to apply?

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A I think it applied as follows: you could have two months with $50,000 profit in each month, say you had that for May and June; now, you had three months in a row of losses of $5000 each month, July, August, September, you would still be averaging if my mathematics are right $15,000 a month profit, and, therefore, satisfy that part of the test.

Nonetheless,Plessey wanted the right if the trend was down so you had a couple of good months, but now you are losing,losing, losing, they wanted to be able to step in and take over. That is the reason for that provision.

Q Is there any way that provision could become operative until there were a number of months where substantial profits had been made and then a decline started?

THE COURT: I don't follow that question. I think that is just what he said.

MR. MALONEY: I will withdraw the question.

Q What was the relationship of that provision to the language appearing before the word "or" concerning averaging profits of $15,000 per month?

MR. McCONNELL: Is the question, what is the relationship between the loss provisions and the averaging provisions?

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MR. MALONEY: Yes.

THE COURT: The witness has said there were two prongs to the test; one prong was three months of consecutive losses and the other prong was an average of $15,000.

THE WITNESS: That is exactly right.

Q What was the relationship between these two provisions?

THE COURT: What do you mean by relationship? He said these were the tests, divided into two prongs. I don't quite know what you mean by relationship.

MR. MALONEY: I withdraw the question at this point, your Honor.

Q Taking Plaintiff's Exhibit 4, your February 18 letter and the amendment, was there any change in the language of that second prong, that three consecutive months of loss?

A Yes.

Q What was the change?

A In the March 2nd amendment ISL got credit for any profits in March and April.

Q Would that have anything to do with the second prong, the three consecutive months of loss language following the "or"?

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A No.

Q I just want to take the words that start with "or if there have been three consecutive months of losses during that measuring year (excluding the first two months thereof)," now, was there any change in those words from the February 13 letter, Plaintiff's Exhibit 4, to the March 2nd amendment, Plaintiff's Exhibit 5?

A No, sir.

Q So those words did not have to be changed in any way with respect to shortening the averaging provision by 30 days? Is that correct?

A That is right.

Q So they have nothing to do with the amount of time within which Mr. Kovar would have to average $15,000 either under the February 18 letter or under the March 2nd amendment? Is that correct?

A I don't think I understand that question.

THE COURT: I am not sure I do.

MR. MALONEY: I will withraw the question, your Honor.

THE COURT: Ladies and gentlemen, I think we will recess at this point. I told you yesterday I had some matter that was coming on earlier this morning. Due to matters over which the parties had no control, I couldn't

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do it. This involves a lot of people from long distance. I am going to take a recess right now so that I can listen to this other matter. It may be no longer than five minutes. I will do it as fast as I can.

(Recess.)

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(In open court, jury present.)

THE COURT: Thank you, ladies and gentlemen, for bearing with me on these matters that I had. I am sorry they took a little longer than I hoped they would.

All right, you may proceed.

BY MR. MALONEY:

Q Mr. Lewis, do you remember that I took your deposition under oath at the office of Mr. McConnell on July 17, 1973, in Chicago?

A Yes, I do.

Q At page 26 of the deposition do you recall my asking you this question and your giving this answer:

"Q Do you recall whether Mr. Kovar made any statement about his authority to Mr. Dubin or Mr. Albert with respect to these amendments?

"A I do not recall."

A Yes.

Q Do you recall that later in the deposition I attempted to refresh your recollection by asking this question: --

THE COURT: The page on that?

MR. MALONEY: 51.

THE COURT: Right.

Q "Q On page 138 of Mr. Kovar's deposition I

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asked the following question and he, Mr. Kovar, gave the following answer:

"Q By the way, was Mr. Lewis present when you stated that you didn't think you had authority to enter into the amendments."

Mr. Kovar answered:

"Yes, sir."

I then asked you "Does that refresh your recollection that he ever stated to Albert or Dubin that he lacked authority to sign the amendments."

And you answered "Yes, I told you that something might have been said about that. Apparently it was."

Then I asked the question:

"Well, do you have a recollection of it being said?"

And you answered "I can't say I have an independent recollection of it, no."

Did you believe those answers to be truthful at the time when you gave them?

A I certainly did.

Q Can you tell me on what basis you now have an independent recollection of being present when Mr. Kovar told Mr. Dubin or Mr. Albert that he may have lacked authority to sign the amendments?

A Yes.

Q What is that?

A I had dinner with Mr. Kovar last Sunday and we discussed the very point you are questioning me about. He reminded me of our leaving the room and discussing it, our returning and his making the point and I do remember it now.

Q Other than this recent dinner with Mr. Kovar--withdrawn.

Did you make any notes of what took place at the closing?

A No, I did not.

Q Other than this recent dinner discussion with Mr. Kovar, do you have any other basis for saying this morning that you recall hearing Mr. Kovar tell Mr. Dubin or Mr. Albert that he lacked authority or may have lacked authority to sign the amendments?

A No.

Q Following the closing, what did you do to clarify the question of whether or not Mr. Kovar was authorized to sign the amendments at the closing?

A Nothing.

Q Did you make a report to the board of directors of ISL concerning what had happened at the closing?

A No.

Q Did you discuss what had happened at the closing with any of the directors?

A I don't remember. I may have discussed it with Mr. Carlen, but I don't remember.

Q So, to your recollection at no time between March 2nd and June 9th did you make any attempt to have the board of directors of ISL --

THE COURT: Those are the winds of spring, ladies and gentlemen.

JUROR NO. 4: The winds of spring of 14 degrees.

THE COURT: Yes.

MR. MALONEY: Could I have as much of the question as you have there?

(Read)

Q -- either approve or disapprove the actions which Mr. Kovar had taken at the closing in agreeing to those amendments?

A That's right, I did not make such attempt.

Q Did you make any attempt to put any of the directors on notice that there had been an important change in the contract at the closing?

A No.

Q Mr. Lewis, I show you Plaintiff's Exhibit 3 in

evidence, which is the final agreement signed on February 4th. Turning again to paragraph 13, paragraph 13 starts off:

"All of Plessey's obligations under this agreement are subject to the fulfillment, prior to or at closing, of each of the following conditions:".

Going down to D it says: "Plessey shall have been furnished with an opinion dated the closing date, of counsel for ISL, Sonnenschein, Levinson, Carlin, Nath and Rosenthal to the effect that" and I will skip over the small paragraph 1 and I will go to 2.

"The execution, delivery and performance of this agreement by ISL have been duly authorized and approved by all requisite action of ISL's board of directors and stockholders and that this agreement has been duly executed and delivered by ISL and constitutes the valid and binding obligation of ISL in accordance with its terms."

Now, what did you understand that provision to mean?

A What it said.

Q Could you explain to the jury in non-legal terms what that means?

THE COURT: That is hard to ask a lawyer. Perhaps

if you were telling a client what that meant, what would you tell him?

THE WITNESS: That is a helpful starting off point your Honor.

A sale of all the corporation's assets under the law of Barbados requires that the board of directors approve the sale of assets and that the shareholders meet. In fact, in Barbados the shareholders have to meet twice to approve such a sale.

So this opinion is to say that those meetings took place and that the directors and the shareholders voted in the proper portions, which I think are 75 per cent, in favor of executing this agreement and carrying it out.

Q Now, would Plessey have had a right to refuse to close the transaction if they did not receive the opinion letter described in paragraph 13D from your firm?

A I will not express an opinion on that.

THE COURT: It was a condition of the closing, wasn't it?

A That an opinion to that effect be delivered.

THE COURT: Would be given, that was a condition of the closing.

MR. MALONEY: Your Honor, I think since the

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witness is an attorney that this is clearly a matter on which he should be able to express an opinion. He was representing the company at the closing and I think he would have to know what had to be done and what could not be done.

THE COURT: I think it is pretty hypothetical and it seems to me if you hadn't given this opinion, you wouldn't have complied with the contract, isn't that right?

THE WITNESS: Yes, your Honor.

THE COURT: And if you didn't comply with the contract, the other party could say, you are not complying. They could decide what they wanted to do, either they could waive it or go on with it or whatever, but they would have had an option there, wouldn't they?

THE WITNESS: They certainly would have had the option.

THE COURT: Right.

MR. MALONEY: All right.

Q Did you deliver to Mr. Dubin an opinion letter at the closing?

A Yes.

Q I show you Defendant's Exhibit AB in evidence and ask you if you can identify that as the opinion letter which you delivered to Mr. Dubin at the closing.

A Yes, I can.

MR. MALONEY: May I read the letter, your Honor?

THE COURT: Sure.

BY MR. MALONEY:

Q This is a letter and I assume the original of it was on the letterhead of your firm, Mr. Lewis?

A I am sure thats right.

(Mr. Maloney read Defendant's Exhibit AB in evidence to the jury.)

T5 Q And it says "Very truly yours," and a place for your signature?

A Yes.

Q Did you sign a copy of this letter and deliver it to Mr. Dubin at the closing?

A Yes.

Q At the time when you handed this opinion letter to Mr. Dubin did you say to him that this opinion did not apply to the amendments that were signed at the closing on March 2nd?

A I don't remember saying anything like that.

Q Do you recall whether you had any meetings or conversations with Mr. Kovar between March 2nd and 3rd, the date of the closing, and June 9 or 11, when you saw him in Chicago?

A Oh, yes, I had at least telephone conversations with him.

Q Did you ask Mr. Kovar whether or not he had checked at the board of directors to see whether or not they had approved or disapproved of what he did at the closing?

A I don't recall.

Q I show you Defendant's Exhibit X, which has been identified as a memorandum written on or about March 5 by Mr. Kovar to his board of directors, discussing what happened

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at the closing. I ask you, have you ever seen that document before?

A I think I have.

Q Do you recall when you first saw it?

A No, I have no idea.

Q Do you recall whether you may have received a copy of it between March 2nd and 3rd and June 9 or 11?

A I think itvery likely I did.

Q And is there anything in Mr. Kovar's memorandum dated March 5 concerning the change in the management control provision that was made at the closing on March 2nd?

A No.

Q Did you ever ask Mr. Kovar why he made no reference to that in his report to the board of directors concerning the closing?

A I don't recall doing so.

Q When do you recall discussing for the first time with Mr. Carlen what took place at the closing on March 2nd?

A Well, I certainly recall meeting in his office in June, but I am not sure that we didn't have telephone conversations before that. I don't know.

Q Well, Mr. McConnell can correct me if I am wrong, but I believe that Mr. Carlen said that he did not find out about the March 2nd amendment concerning management control

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until some time between June 11 and June 14?

MR. McCONNELL: I am not sure that is his testimony, but it is a week in June.

THE COURT: Yes.

Q Do you recall ever discussing the change in the management control provision with Mr. Carlen prior to the first seek of June?

A No, I don't recall.

Q During the first week of June was there a meeting in Mr. Carlen's office which you attended?

A I think I have heard the date June 9, but I really don't know about the dates.

Q Well, on June 9 had Mr, Kovar or anyone else from ISL received Mr. Sinsheimer's letter of June 9 giving notice that Plessey was assuming management control?

A I assume not.

Q Do you recall whether or not there was a discussion with Mr. Carlen of the change in the management control provision before Mr. Sinsheimer's letter of June 9 was received?

A There was a meeting in Mr. Carlen's office which I attended in June. I think it was before Mr. Sinsheimer's letter was received. But I think that Mr. Kovar expected the contents of that letter to be what they subsequently

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proved to be. I may have my dates slightly wrong, but it happened in June, though.

Q As a result of that was the change in the management control provision at the closing brought up at that meeting in Mr. Carlen's office?

A Well, I am sure it must have been. It was material to the subject of our discussion, so it must have been.

Q Was Mr. Carlen surprised to hear about that change?

A He expressed himself as very surprised.

Q Did he at that time question Mr. Kovar's authority to sign that amendment?

A Yes, I think he did, either then or very shortly thereafter.

Q Did he ask you and Mr. Kovar why neither of you had communicated with him concerning that change before the first week of June?

A I don't remember his asking that. That wasn't really the tone of the meeting.

Q What was the tone of the meeting?

A It was to try to decide the best way to deal with what we felt was ISL's wrongful takeover. We considered immediate litigation. It was a going forward kind of

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meeting, in short.

Q At the time of this meeting, if I understand your testimony correctly, Plessey had not taken over?

A Mr. Kovar apparently knew it was going to take over.

Q What was the substance of the discussion concerning the March 2nd amendment at that meeting in Mr. Carlenb office?

A Well, the substance of the discussion was to interpret that amendment and its effect on our contractual rights, on ISL's contractual rights.

Q Do you recall who else was at the meeting besides yourself and Mr. Carlen and Mr. Kovar?

A No, although I think possibly Mr. Haggerty and Mr. Johnson were at that meeting.

Q How about Mr. Murray?

A I think so.

Q Did any of these gentlemen ask you whether or not the March 2nd amendment was a valid and binding part of the contract with Plessey?

A Not that I recall.

Q Well, did Mr. Carlen ask you whether Plessey could enforce that amendment against ISL if Mr. Kovar had no authority to sign it?

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A No, I don't remember being asked that question.

Q Well, was there any discussion of whether or not Plessey had a right to assume management control in June based on the March 2nd amendment?

A Yes.

Q Did Mr. Carlen ask you whether or not Plessey had a right to assume management control based upon that amendment in June?

A Either he or someone present at the meeting did.

Q What was your response?

A That they had no such right.

Q Why did they have no such right?

A Because the averaging period had gone on at least till the end of June.

Q And Mr. Carlen clearly understood that?

A I don't know what he understood. I hope I explained it clearly.

Q How long did the discussion go on?

A I think all morning.

Q Assuming that the March 2nd amendment became a valid part of the contract, did you tell Mr. Carlen that the assumption of management control would be premature even under that amendment because Mr. Kovar was entitled to an additional month?

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A Not Mr. Kovar.

Q Or that the company had an additional month?

A Yes, the company had at least until the end of June.

MR. MALONEY: Your Honor, I would like to read a question which I asked Mr. Carlen yesterday and the answer which he gave, page 501:

"Q When for the first time did someone advise you that Plessey's assumption of management control on June 9th was in violation of the terms of the amendment signed on March 2nd?

"A It was some time just prior to my sending the letter to the shareholders, which I did as an individual and as a director, advising them of what had taken place; that the question of whether this was proper action on the part of Plessey or Mr. Kovar was not resolved; that there was a question here.

"Q Was that some time in August?

"A I would guess it could be -- when did my letter to the shareholders go out?

"Q August 11, I believe.

"A It could have been the first week in August when Larry Kearns and I had a discussion about this, yes."

Now, does this refresh your recollection that

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no one told Mr. Carlen at the meeting in his office on June 9 that the assumption of management control was premature if the March 2nd amendment was valid?

MR. McCONNELL: Your Honor, I am going to object to the form, because unless he reads my redirect -- there is an answer on my redirect to that point.

THE COURT: All of this is trying to help the witness to jog his memory. If it does jog his memory he can answer the question. If it doesn't, he need not answer the question.

A My memory is that that bit of testimony is just a mistake.

THE COURT: You don't agree with that?

THE WITNESS: No, I don't. I am sure it was discussed at a meeting in June.

THE COURT: What you are saying is that Mr. Carlen's memory was faulty in thinking it did not come up until August?

THE WITNESS: Yes.

THE COURT: You think it came up a lot sooner?

THE WITNESS: I do.

Q If I understand your testimony correctly, at the time of this meeting in Mr. Carlen's office the discussion was based upon what Mr. Kovar expected to happen

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within a few days? Is that correct?

A Yes, that is my best recollection. It's possible that that meeting took place after we received the letter. I am really not sure, but it happened early in June.

Q But at some time a day or two before or after that meeting Mr. Kovar brought with him to Chicago a copy of Mr. Sinsheimer's letter dated June 9?

A Yes, I certainly saw one early in June.

Q That is Plaintiff's Exhibit 26. I give you a copy.

Now, based upon Mr. Sinsheimer's letter, what did you understand to he the basis upon which Plessey was assuming management control?

A A completely mistaken view of its rights under the contract.

Q Whether or not Plessey was mistaken, what did they say was the basis upon which they were assuming management control?

A They said that ISL did not reach $15,000 of profits in May and, therefore, they had a right to take control. That totally differed from my understanding of the contract.

MR. MALONEY: May I read the letter?

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(Mr. Maloney reads from Plaintiff's Exhibit 26 in evidence to the jury.)

BY MR. MALONEY:

Q Now, Mr. Lewis, did you personally ever communicate with Mr. Sinsherimer or Mr. Dubin and tell them that they had no right to assume control based upon the letter of June 9 because Allan Kovar lacked authority to sign that amendment at the closing on March 2nd?

A Well, the answer is I didn't communicate with either of them ever.

Q You never from June 9 forward communicated with Mr. Dubin or Mr. Sinsheimer personally?

A I don't think I have ever seen either of them since.

Q Now, Mr. Kovar's expectations were confirmed by the receipt of Mr. Sinsheimer's letter dated June 9, Plaintiff's Exhibit 26. What was the response of ISL to Mr. Sinsheimer?

A A letter from Mr. Carlen that I helped prepare later that month. There may have been other responses. I don't know what Mr. Kovar said to Sinsheimer.

Q I am just trying to get your personal responses. I show you Defendant's Exhibit AM and AS and I ask if you can identify those documents?

A Yes.

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Q Could you tell the jury what those two documents are?

A One is a letter from me to Raymond Carlen dated June 15, 1970. Do you want me to read it?

Q "Dear Ray:

"Enclosed is a draft of the letter I discussed with you today. I am also sending a copy to Ted Murray and would appreciate any comments either of you may have.

"Harold Shapiro and I have discussed this and we think that the letter might better be signed by you and by Allan, and I will tell Allan when I talk with him tomorrow. Once the letter has been sent, we can decide how to follow it up and arrange for a time and place for a meeting.

"Best regards,

"Very truly yours,

"Sonnenschein, Levinson, Carlin, Nath & Rosenthal,
"By Julius Lewis."

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Q That is Defendant's Exhibit AM. And is Defendant's Exhibit AZ the draft of the letter which you sent to Mr. Carlen with your letter of June 15?

A I am sure it is.

Q Now, you say in your letter that you discussed the draft letter with Mr. Shapiro before you sent it to Mr. Carlen? Is that correct?

A Yes.

Q Is Mr. Shapiro a partner of yours in the Sonnenschein, Levinson firm?

A Yes, sir.

Q Could you tell the jury who Mr. Murray is?

A Mr. Murray is an attorney in Chicago who is a shareholder of ISL and who was interested in this matter and present at various meetings.

Q Do you know what firm Mr. Murray is with?

A Yes, it is called Seyfirth, Shaw -- I am not sure about the other names.

Q That is the same firm in which Mr. Kovar was a partner at one time?

A That is right.

Q Do you recall whether or not you ever received any comment on your draft letter from Mr. Murray?

A No, I don't recall.

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Q But Mr. Murray was at the meeting in Mr. Carlen's office where you discussed the fact that the amendment was invalid because Mr. Kovar had no authority to sign it? Is that correct?

A Yes, he was present at the meeting.

Q During that meeting it was also discussed even if the amendment were valid Plessey was taking over one month earlier? Is that correct?

A That is correct.

Q Mr. Lewis, I show you Plaintiff's Exhibit 27 in evidence, which is Mr. Carlen's letter to Mr. Sinsheimer dated June 17, 1970. I ask you if you have ever seen that document?

A Yes.

Q Do you recall whether you reviewed that letter in its final form before Mr. Carlen sent it to Mr. Sinsheimer?

A I doubt it. He may have read it to me on the telephone before he sent it.

Q Is it your best recollection that Mr. Carlen did clear the language with you in one way or another before he sent it to Mr. Sinsheimer?

A I just can't be sure, Mr. Maloney.

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Q Does either the draft letter, Defendant's Exhibit AS, or the final letter, Plaintiff's Exhibit 27, say anything about whether or not Mr. Kouvar had authority to sign the amendment on March 2nd?

A No.

Q Does either the draft letter or the final letter say anything about whether or not Plessey was assuming management control one month early under the terms of the March 2nd amendment?

A Not in so many words, no.

Q I show you Plaintiff's Exhibit 4, which is your letter dated February 18th, and I show you Plaintiff's Exhibit 5 in evidence, which is the March 2nd amendment.

Now, referring to your letter of February 18th, does that language correctly express your understanding of what the management control provision was prior to any amendments on March 2nd?

A Yes.

Q Under the language which you drafted in your February 18th letter how many months of the measuring year would be afforded to ISL within which to reach a profit level of $15,000?

A Four.

Q In what months were those?

A That depends on when you close.

Q Assuming a March 2nd closing.

A Okay. Then the months would have been April, May, June and July.

Q Now, referring to Plaintiff's Exhibit 5, the March 2nd amendment, how many months of the measuring year would ISL have been permitted to reach the $15,000 profit level?

A 3-7/8, approximately.

Q Well, I don't understand the 7/8.

A Because the amendment --

Q You mean you allowed Mr. Kovar now under the amendment to count profits from March and April?

A No.

Q Why don't you explain what you mean?

A But for the amendment you would still have counted April, May, June and July.

Q That is under the February 18th agreement?

A Yes, but for the amendment. What the amendment did was say you count March even though a small part of March had already elapsed before the contract was closed. So the effect of that was to make the period March and April for the turnaround period, if you will, and May and June the averaging period.

Q So it was your understanding that Mr. Kovar still had four months under the March 2nd agreement?

A Four months minus a few days, yes.

Q But in terms of just taking the months in the measuring year, how many months in the measuring year did he have?

A I have answered it, four months less a few days that elapsed in March.

Q It would be three, April, May and June under your interpretation, those would be the months of the measuring year that would be included?

A No, it wouldn't be 3; it would be 4.

Q So under both the February 18th letter and under the March 2nd agreement Mr. Kovar had four months? Is that your testimony?

MR. McCONNELL: Four months for what?

MR. MALONEY: I will withdraw the question.

xx (Defendant's Exhibit CM marked for identification.)

Q Mr. Lewis, I show you Defendant's Exhibit CM for identification and I ask you if you can identify that document.

A Yes, sir.

Q Would you explain to the jury what that document is?

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A Yes, it's an affidavit I signed for use in a hearing in this case in Chicago.

Q There was some early hearing in this case in Chicago and you swore that this affidavit was accurate on December 14, 1971? Is that correct? Turning to page 2?

A Yes.

Q And at the time you prepared this affidavit did you attempt to make it as accurate as you possibly could?

A Yes, I did.

Q Turn to page 5 of the affidavit, Mr. Lewis.

THE COURT: Page what?

MR. MALONEY: Page 2, paragraph 5 of the affidavit.

Q It says, "On February 2nd and 3rd in long distance telephone calls between myself and Dubin still further changes in the purchase agreement were negotiated and agreed to."

And I will skip over 1 and 2, if Mr. McConnell has no objection.

"3: Provision for a three months averaging to determine whether $15,000 per month profit was earned (under paragraph 5)."

I ask you what three months you were talking about in this affidavit?

A I think at the time I prepared this I was reading the contract to mean that you had to average earnings over the same three months.

THE COURT: I think he is asking you which months they are.

THE WITNESS: Under the contract?

THE COURT: No, the months that you had in mind in the affidavit.

Q This affidavit was prepared in 1971, is that correct, Mr. Lewis?

A Yes.

Q At that time ISL had already commenced litigation against Plessey in Chicago? Is that correct?

A I am sure it is.

Q And this affidavit was prepared in connection with that litigation? Is that correct?

A Yes.

Q Now, before commencing litigation against Plessey Incorporated did you and Mr. Shapiro andMr. Kovar and Mr. Carlen and Mr. Murray all sit down and discuss the contract to make sure you all understood what it meant?

A No.

Q No?

A No.

Q Well, as of December, 1971, how many months did you understand Mr. Kovar had to achieve 15,000 profit under the March 2nd amendment?

A How many months after the first two months?

Q How many months, Mr. Lewis. I believe you just testified four.

A That is right.

Q Now, what has happened between December, 1971, and today to make you refer to four months today when you referred to it as a three months averaging provision in December, 1971, in your sworn affidavit?

A Well, I am not quite sure what I meant, but what I think Imeant was he had five months, that there was three months averaging after the two-month turnaround.

Q Well, what five months would those be?

A March, April, May, June, July.

Q Under the March 2nd amendment?

A Yes.

Q Are you now saying that it was your understanding in December, 1971 --

THE COURT: I think you have gotten me confused. Maybe you have gotten the witness confused. He has already indicated, and I thought he answered, that by saying that he thought the three months averaging followed the two

months turnaround, that that made five months, and he said it was March, April, May, June and July.

Is that right?

THE WITNESS: That is right, your Honor.

Q And that was referring to the February 18th letter?

A No, it is referring to the agreement as amended by the March 2nd agreement.

THE COURT: You dont say that in the affidavit.

THE WITNESS: No, I beg your pardon, the February 18th letter is correct.

Q So that when you say that you talked to Dubin on February 2nd and 3rd and asked him to include a provision for three months averaging to determine whether $15,000 per month profit was earned, you meant you asked him to include that in what eventually became the February 18th letter? Isn't that correct?

A That is right.

Q So you referred to it as a three months averaging provision before there was any amendment on March 2nd?

A That is right.

Q With respect to the February 18th letter what did you mean by the words "three months averaging"?

A I told you before that I'm not sure what I meant. What I think I meant was that since there was a provision

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in the contract that Plessey could take over after three months of consecutive losses that I read the averaging provision to mean the same thing, so there would be a two-month turnaround. And a three-month averaging period.

Q You mean as of February 18th you thought tha April and May would not count against Mr. Kovar?

A Assuming we closed in March, right.

Q And that he would be given June, July and August to average $15,000 profit?

A That is right.

Q Did you ever say that to Mr. Dubin?

A I don't remember doing so.

Q But the plaintiff's position in this court today is that the February 18th letter only meant that they had June and July to average $15,000 profit?

A That is right.

Q Now, since you are the gentleman who prepared the February 18th letter, and as of December, 1971, you understood it to be three months averaging, how could Mr. Kovar understood it to be June and July?

A I can't answer that.

MR. MALONEY: I have no further questions, your Honor.

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eoh 1 Lewis-redirect

T6 THE COURT: All right, any questions?

MR. McCONNELL: I have just a couple, your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. McCONNELL:

Q In your March 2nd opinion letter, referring to your March 2nd opinion letter, which was given to Plessey at the closing, when was that prepared?

A In Chicago late in February before I left for Barbados.

Q What was this agreement referred to in the opinion letter?

A It was the agreement of February 4th as amended by letter of February 18th.

Q Now, in answer to Mr. Maloney's question, did you state in your draft or Mr. Carlen in his redraft, the June 17th letter, that Plessey's takeover was premature or early by one month and you answered "Not in so many words." What did you mean by that, or can you clarify that.

A Yes.

MR. MALONEY: I would object at this time if Mr. McConnell is eliciting Mr. Lewis' understanding of the words that were actually placed in the June 17th letter

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because I don't think his understanding of those words is relevant to this case.

THE COURT: I will let him answer.

MR. McCONNELL: It is what you have been asking him about all morning, I think.

THE COURT: I will let him answer the question.

A We thought that saying that we would view Plessey as a trustee was a polite way of telling them that they were taking over wrongfully and that if they took over they served with a duty to be absolutely faithful to paying us the maximum price.

THE COURT: Weren't they under that duty anyway under the contract?

THE WITNESS: That was our understanding, your Honor.

THE COURT: What were the words used, they had to operate in good faith?

THE WITNESS: Yes, but we were reminding them of something more in our letter.

THE COURT: You were stressing more than good faith by saying they were the trustee?

THE WITNESS: Yes, that was our attempt. We wanted to avoid litigation and we thought this was the polite way of doing it.

Q I show you the notice to the shareholders, which you previously identified and said that you prepared.

A Yes.

Q Did you give a copy of that to Mr. Dubin?

A Yes, I am sure I did.

MR. MALONEY: Excuse me, your Honor, I didn't get the exhibit number?

MR. McCONNELL: It is 9, I think, isn't it?

THE WITNESS: It says Plaintiff's Exhibit 9.

MR. MALONEY: Your Honor, I would object at this time to any further inquiries concerning the proxy statement because I don't believe I cross-examined on that.

MR. McCONNELL: I just forgot to examine him on direct and with that question I have nothing further.

THE COURT: Do you have any further questions?

MR. MALONEY: No, your Honor.

THE COURT: All right, thank you, Mr. Lewis. You are excused.

(Witness excused.)

THE COURT: I think we will take our luncheon recess now, ladies and gentlemen, and we will meet at a quarter to 2, if that would be convenient.

MR. MALONEY: I would like to offer Mr. Lewis' affidavit in evidence. I forgot to do that.

THE COURT: Any objection?

MR. McCONNELL: No objection.

THE COURT: Defendant's Exhibit CM will be received.

(Defendant's Exhibit CM received in evidence.)

(Luncheon recess.)

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HAROLD D. SHAPIRO, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McCONNELL:

Q Mr. Shapiro, where do you live?

A 34 Linden Avenue, Wilmette, Illinois.

Q Are you an attorney?

A Yes, sir.

Q With what law firm are you?

A Sonnenschein, Carlin, Nath & Rosenthal.

Q Are you also a teacher?

A Yes, sir.

Q Where at?

A Northwestern University School of Law.

Q What courses do you teach there?

A This semester it is a course called Business Planning, which is an amalgam of corporate tax and securities law. In the fall semester it is Advanced Business Associations, which is partnership, limited partnership, etc.

Q Did you have occasion to participate in any of the negotiations which resulted in the acquisition of ISL by Plessey?

A Yes, sir.

Q When is the first meeting that you recall

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participating in?

A December 21, 1969.

Q Where did that take place?

A In New York, in Mr. Warren Sinsheimer's office.

Q Who else was present?

b2 A Allan Kovar.

Q So it was just the three of you?

A I can't remember anybody else being there.

Q Was there some discussion at that meeting about the possible acquisition?

A Yes, sir.

Q Was there any mention of price by either side?

A Yes, sir.

Q What was said on that subject and by whom?

A On behalf of ISL, and this was expressed by either Mr. Kovar or myself, or both of us, the sales price was two million eight. Mr. Sinsheimer's response was that he would not consent to a purchase at more than a million.

Q Following that meeting did you have some further discussions with Mr. Sinsheimer on the question of price?

A I have a vague recollection of some telephone calls. When they occurred, whether it was immediately afterwards or some time in January I do not remember, but

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I think it was toward the end of December.

Q And what do you recall of those conversations?

A Mr. Sinsheimer did not recede from his original position with regard to the one million.

Q Did you participate in any further face-to-face meetings with Plessey representatives?

A Yes, sir, on January 6th, 1970.

Q Do you recall who was at that meeting?

A Mr. Kovar, my partner, Mr. Julius Lewis, Mr. Sinsheimer, I think a man by the name of Milton Albert, and I think a man by the name of Clarke. My recollection is he was from London, Mr. Clarke was.

Q What, if anything, was said at that meeting on the subject of price?

A I know there were further discussions, but I couldn't pinpoint what was said at that meeting and by whom.

Q Well, do you recall whether or not there was any agreement reached at the January 6th meeting on the amount of the purchase price?

A It is not my recollection that there was an agreement that day.

Q Did you participate in any further face-to-face meetings with Plessey representatives?

A Yes, there was one more meeting on the 14th of January.

Q Where did that take place?

A Again, in Mr. Sinsheimer's office. All three of those meetings were in Mr. Sinsheimer's office.

Q Who was present?

A Mr. Kovar, Mr. Sinsheimer, maybe Mr. Albert, and a man by the name of Frey, a Plessey officer or employee.

Q Well, at that meeting was there any discussion of price?

A Yes, sir, at that meeting there was.

Q What was said on that subject and how was it finally resolved?

A I believe it was Mr. Frey that said that the purchase price could not be more than a million four hundred and some-odd thousand dollars, the final purchase price that was resolved, the final purchase price as reflected in the contract.

It is my recollection also that he was talking about not a cash deal, but rather a stock deal, by that I mean, Plessey would issue stock to ISL for its assets and the number of shares multiplied by the then market price came out to a million four hundred some-odd thousand dollars.

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Q Was there any discussion as to whether any of this consideration would be paid down at the beginning?

A Yes, sir.

Q What was said on that and by whom?

A Again, by Mr. Frey, that a number of shares--and I can't remember how many -- would be paid at closing, and it was that number of shares multiplied by the then market price that came out to $180,000.

Q Now, in all of these meetings that you had, first, the one in December, and then the two in January, January 6th and January 14th, was there any draft of contract?

A Not that I remember.

Q Did you then drop out of the negotiations at that point?

A Yes, sir.

Q And who took over?

A Julius Lewis.

T2

Q What was your next contact with the Plessey-ISL matter that you recall?

A I think that it was some conversations that I had with Lewis after I returned from Europe. The reason I dropped out was that I had to go to Europe for business and came back and we talked about it. I don't know whether I ever saw the draft of the contract.

Q I show you what is in evidence as Plaintiff's Exhibit 28, which is a letter from Mr. Sinsheimer to Mr. Carlen, under date of June 22, 1970, and ask you if you have seen that before?

A Yes, sir.

Q I take it that came to your attention sometime about the date it bears?

A Yes, sir.

Q What, if anything, did you do in connection with that letter?

A I remember having a telephone conference with Raymond Carlen, who had received it. I guess I must have seen a copy of it and then called him or he called me to discuss its contents.

Q Would you read the letter to the jury, please.

(The witness read Plaintiff's Exhibit 28 to the jury.)

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Q But notwithstanding Mr. Sinsheimer's statement that he saw no useful purpose in a meeting, did you attempt to set up such a meeting?

A Yes, sir; I did.

Q Did you call him?

A Yes.

THE COURT: Did you what?

MR. McCONNELL: Call him.

THE COURT: You called Sinsheimer?

THE WITNESS: Yes, sir.

Q And as a result was a meeting set up?

A Yes, sir.

Q Do you recall the date of the meeting?

A I think it's July 9th, but I am not sure. It was early in July, 1970.

Q Where did that meeting take place?

A Again in Mr. Sinsheimer's office.

Q Who was present?

A Mr. Carlen and I and Mr. Sinsheimer.

Q Would you tell us, as best you recall, what was said at that meeting by the three of you?

A I think the first thing that was said was that Mr. Sinsheimer apologized for the tone of the letter that I just read. He said that he recognized now that

it was overly curt and that he was sorry about it.

Mr. Carlen or I or both of us then asked for financial statements. I think that was the next order of things.

Mr. Sinsheimer refused.

Mr. Carlen and I or both of us then stated that ISL intended to treat Plessey as trustees and Mr. Sinsheimer rejected that motion, as he had in the letter.

He then said, and this is a paraphrase because I can't give the exact words, "I don't know what you fellows are worried about. This company is going to make its earn-out, it's going to make at least $360,000."

And it is my recollection that he then made a telephone call to somebody and at the end of the telephone call said, "We think it is going to make $600,000 in the measuring year. As a consequence, you'll get the full amount of the earn-out."

b2

Q The full amount would have been what?

A A million two hunded some-odd thousand dollars.

Q What else was said?

A Different from that, I don't recall. Much was said because the meeting lasted, I think, for three-quarters of an hour, but I think that I have taken care of the general tenor of the conversation.

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Q Do you recall whether or not there were more than one request for financial information?

A You mean did we keep on saying, "You ought to" and he kept on saying, "No"?

Q Yes.

A I think probably yes. There probably was more than one request.

MR. McCONNELL: That is all I have.

MR. MALONEY: We have no questions, your Honor.

THE COURT: Thank you, Mr. Shapiro. You are excused.

THE WITNESS: Thank you.

(Witness excused.)

MR. MALONEY: Your Honor, could we have a moment to get out our papers to continue with Mr. Kovar? We are going to proceed to that exhibit concerning the customers and so on.

THE COURT: Will you need a recess for that do you think?

MR. MALONEY: No, your Honor.

THE COURT: All right, the jury and I are very patient. We are glad to give you time to do that.

Mr. Kovar, would you kindly return to the stand.

E. A L L A N K O V A R, resumed.

eoh6 Kovar-cross

THE COURT: That will go to the weight of it, but I think if the figures are accurate, I will receive it.

MR. McCONNELL: The figures are accurate.

THE COURT: Then, I will receive this exhibit and the weight of it, of course, is something else again, but it is supposed to a summary of these other exhibits, D, CJ and AH?

MR. MALONEY: Yes, sir.

THE COURT: All right.

MR. MALONEY: I believe I also indicated that since this would be somewhat complicated, I have copies for the jury so they can follow along.

THE COURT: You may hand them to the jury.

xx (Defendant's Exhibit CK received in evidence.)

CROSS EXAMINATION CONTINUED

BY MR. MALONEY:

Q I would also like to give you the exhibits which are referred to on Exhibit CK, Mr. Kovar, which are Defendant's Exhibit F, the 1970 ISL budget, Exhibit D, the 1970 ISL sales forecast, Exhibit CJ, Mr. Tucker's May 24, 1970, bookings forecast and Exhibit AH, which is your memorandum of May 26, 1970.

Referring to Defendant's Exhibit CK, which is the document summarizing the information, what I have

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done is I have placed in column I, if you turn over to the third page of the exhibit, the name of each customer appearing on any of those documents.

In the column with the Roman numeral II at the top of the column, I have indicated the amount of sales projected based on Defendant's Exhibit D, which was the sales forecast which you testified you prepared based on a conference with the sales representatives in December, 1969.

Now, in column 30 I have taken the figures from Exhibit CJ, which is the bookings forecast prepared by Mr. Tucker on May 24, 1970, and they would be from the column headed "bookings forecast" on Mr. Tucker's document.

In column IV, I have taken the amount of the actual amount of the order, which you indicated you had in your memorandum of May 26, 1970.

Do you understand that, Mr. Kovar, how we have compiled the figures?

A Yes, I didn't understand your very last remark. I wonder if that could be read back.

(Record read.)

A There is a correction to that, Mr. Maloney, I think. The AH, column IV, represents the orders for delivery through the months of May through December of 1970.

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Q AH being your May 26th memorandum?

A Yes, sir.

Q And those are the actual orders which you had as of May 26th --

THE COURT: For May to December delivery I think is the point you make on that?

THE WITNESS: Yes, your Honor.

Q Those orders listed at the bottom of the memorandum just covered products that would be delivered from May through December, 1970; is that correct?

A That is correct, sir.

Q Looking at column 2 and what I have done to try to make this as short as possible, I have tried to take only the larger orders that were involved. I have tried to skip over the smaller orders and if Mr. McConnell feels that they are important or they distort what I am going to try to show now, he can always add them in or request that I do so.

Looking down column 2, I see Cambridge Memories was projected as a $269,000 order in December, 1969; is that correct?

A That is what it shows; yes, sir.

Q By May 26, 1970, had you obtained a written order from Cambridge in any amount?

A Not for delivery from May through December.

Q Had you obtained any order from Cambridge at all for delivery in any period?

A It is my recollection that we had. I think that we had received an order for one or two prototype units. It would not have called for delivery May through December or it probably would have been on this May 26th memo.

Q It is my understanding, then, that your May 26th memo, Defendant's Exhibit AH would not include any orders that were contingent upon building a prototype?

A It would not contain anything that didn't call for delivery from May through December.

b3

Q You say you had an order to build prototypes for Cambridge. If those prototypes had been built satisfactorily, when would deliveries have started under the contract?

A I am afraid I can't answer that, sir. I don't recall.

Q Do you recall the date by which you were supposed to deliver the prototypes to Cambridge?

A No, sir.

Q Do you recall whether you had delivered any prototypes to Cambridge by the time you were terminated on June 9th, 1970?

A My recollection is we had delivered a prototype and there was a question as to its meeting their standards.

Q Cambridge indicated that it was not acceptable to them?

A It was still in a state of limbo. There was not an acceptance of it at that point to my recollection.

Q So that ISL would have to attempt to rebuild or redesign the prototype to Cambridge's satisfaction before you would obtain any order for delivery of product; is that correct?

A We may have received the order, Mr. Maloney, but it would have been contingent upon approval and that approval to my recollection had not yet been received. There was still question, as I recall it, as to whether our prototype was satisfactory.

Q Do you have any recollection of why they would want a prototype by May 26, 1970, but would not want any deliveries until beyond December, 1970?

A I don't understand your question?

THE COURT: All he is asking you is you thought they were about to act on a prototype in May, if they had approved it, wouldn't they have wanted delivery of some items before the end of the year?

THE WITNESS: They may have. I don't really know.

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THE COURT: You just don't know?

THE WITNESS: I don't really know.

Q If you had already obtained a written purchase order from them calling for deliveries in May through December, 1970, contingent upon building the prototype order, you would have included it on this memorandum, wouldn't you?

A If that had been the case, but I haven't testified that that was the case, Mr. Maloney. I don't recall what their order called for, whether it only called for the prototype or whether it called for a total number subject to acceptance of the prototype or whether it specified a delivery schedule if the prototype were accepted.

All I can tell you from the May 26th memo is, apparently, we did not have a schedule of delivery of any of these units from May through December, but I don't know what the order said. I can't say.

Q When you had an opportunity to review the customer files at our offices last year, did you attempt to determine whether or not there was any written purchase order from Cambridge?

A Mr. Maloney, as you very well know, you gave me a number of files and it is my recollection that there was no correspondence between customer and ISL in all of

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those files. There were shipping documents, there were purchase orders, there were a number of materials going on in to file after file, but I did not attempt to nor did I attempt to review each file for the status of each customer at any particular time.

Q But the customer files were there in the room with you and Mr. McConnell, were they not, in a metal file cabinet?

A You so advised me and I have no reason to doubt you. I don't recall all the material I tried to look through that afternoon and I don't doubt that that was part of it.

Q Did we give you as long as you wanted to look through all of the material that we had available?

A You gave me no time limit.

Q You could have come back as often as you wanted to to look at that material?

A I assume so. You gave me no time limit.

Q There was a file cabinet in that room with you and Mr. McConnel with the customer files in it; is that correct?

THE COURT: I think you have established all that.

MR. McCONNELL: There were files stacked to the ceiling and we burned out our eyeballs after about two days.

THE COURT: Never mind the comment, but they made these available for your inspection.

Q Mr. Kovar, did you understand at the time when you reviewed the files that one of the issues in this lawsuit would be whether or not ISL had purchase orders for delivery during the measuring year that would add up to the amount that you had projected on your budget for 1970?

A I didn't understand it then and I don't understand that to be the case now.

Q Going down to the Control Data Corporation, referring to Defendant's Exhibit CJ, Mr. Tucket's bookings forecasts, if you look on the second page of that document I see an entry for Cambridge Memories and reading across the line I see a bookings forecast of $50,000, which is the number which appears in column 3 of Exhibit CK, and it indicates capture month, October, and inthe column "comments", it says, "resubmit prototype."

Now, do you recall the basis on which Mr. Tucker had reduced his original projection of $269,000 in orders for Cambridge to $50,000 by May 24th?

A From the exhibit that you are referring to, Mr. Tucker's forecast, it would indicate that he has rounded a figure of the potential sales of ISL to Cambridge at

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250, which would in mymind be comparable to the 269. He has then indicated that the odds of our capturing that order at the point in time when he is preparing this is only 20 per cent, so he has taken 20 per cent of the 250,000 potential order and included that result, namely, $50,000 as his bookings forecast.

T3

Q Well, which column would tell us the amount which Mr. Tucker actually expected to get a written purchase order for?

A Well, I don't think you understand what Mr. Tucker has done here, Mr. Maloney. It is my understanding that what this shows is the potential sales that ISL may be able to get from a named customer, in this particular case, Cambridge Memories, that is, $250,000. He then says that it is his best estimate that we only have a 20 per cent possibility of getting that order.

Now, if the 80 per cent falls, we get zero; if 20 per cent falls, we get all 250,000, but for his booking purposes he then books 20 per cent of 250,000, namely, 50,000, and, in effect, what he is saying for all the entire list if the odds were to work out favorably, that the ultimate bookings forecast would come to be the sales that he would be able to book, the orders that he would be able to book over this period of time.

Q Le me understand then. If we take the 1970 sales forecast which you prepared -- I believe that is Exhibit D -- and we have all those numbers down there that add up to $3,625,000 -- do you have that, Mr. Kovar?

A Yes, sir.

Q Now, is that the sales forecast the kind described

by Mr. Tucker as sales potential or bookings forecast?

A Neither.

Q Neither?

A Neither.

Q Well, which one was this?

A This is the forecast of the sales representative involved as to the orders that he is going to be able to get for ISL for delivery for sales in 1970.

Now, that is as distinguished from bookings forecast, which does not attempt to say we are going to deliver this in any particular period of time; it says we are going to book it during a particular period of time. So it is an apple and an orange. They attempt to say two different things.

Q So we can't compare columns 2 and 3 on Defendant's Exhibit CK, then?

A Not meaningfully, I don't believe.

Q Going down to Control Data Corporation, I see a $126,000 order projected in December, 1969. Is that correct?

A Yes, sir.

Q Now, by May 26, 1970, did you have any written purchase order for any amount from Control Data Corporation?

A Not for delivery from May through December, no, sir.

Q Do you recall if you had a written purchase order for delivery some time beyond December, 1970?

A I do not recall that we did. I can't say positively, but I don't recall any such order.

Q Do you have any recollection of why Mr. Tucker, who was only using a bookings forecast for that customer of $3000 by May 26, 1970?

A He showed a $15,000 potential for CDC at Arden Hills, which is a suburb, I think, of Minneapolis, but he shows only a 20 per cent odds, so he put $3000, namely, 20 per cent of $15,000, and he indicates in his comments that it is still a pilot production, which would indicate that there is substantially more if that program goes from a pilot program into a production program.

Q By May 26, 1970, it had not gone into a production program? Is that correct?

A Well, I don't think so. This doesn't indicate, but I wouldn't think so.

Q Now going down to Dataram, $81,000?

A Yes, sir.

Q Do you recall why Mr. Tucker had completely eliminated that customer from the bookings forecast on May

21, 1970?

A Yes, because Dataram gave us their order directly in Barbados. They were located or had a production facility located in Barbados -- or in Trinidad, excuse me -- and they were asking us to string planes for them, and this was then directly between myself and the president of Dataram and did not go through Mr. Tucker.

Q Do you recall based on your dealing directly with Dataram whether or not you had any written purchase orders for deliveries in May through December, 1970, from Dataram?

A We apparently didn't have such a contract or order.

Q Now, turning to the next page we have General Electric, $50,000?

A Yes, sir.

Q Do you have any recollection of why you did not have a written purchase order for any deliveries during the eight-month period from GE by May 26?

A I think Mr. Maloney, that we had already completed a prototype order for GE, and I would assume from this that we had already delivered it. My recollection is that it was accepted, but I don't remember the date of acceptance. But this would indicate we had no production order from them as of May 26.

Q Going down on to the next page, Information Control Corporation, do you see a $180,000 order projected in 1970?

A Yes.

Q Do you have any recollection whether you had obtained any written order by May 26, 1970?

A My recollection is that we had. I received a production order from them, but we were having trouble collecting money from them. I had met personally with Mr. Goldstick, I believe was his name, who was the president of ICC, in California, and we were attempting to resolve their payment to us and were discussing a components contract, as well as a memory contract for the order that we had before, but I think as of May 26 if we had a prior order we had put it in limbo until payment was determined, and to my best recollection we didn't have an order on the component thing at that point.

Q Had you resolved this difference of opinion on payments before you terminated on June 9?

A I had a promise from Mr. Goldstick.

Q But that didn't occur?

A It didn't occur prior to my termination.

Q Going down to Kicksort, $50,000, do you recall why you had no written purchase order for any part of that

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projection by May 26, 1970?

A Because we had no written order for delivery May through December from Kicksort.

Q Do you have any recollection of why you had not obtained such an order by that point?

A No, sir, I do not.

Q Motorola, $50,000, do you have any recollection of why no purchase order had been obtained by May 26?

A I think there was an order from them, but it was on hold. There was no delivery scheduled during these months. There had been a delivery to them of some units prior to this.

Q Let's go back to your May 26 memo, which is Defendant's Exhibit AH.

A Yes.

Q The first paragraph says, "A review of our current orders, including unreleased units, shows the following dollar shipments through the end of this year. These figures include the catch-up of the present arrearage."

Could you explain to his Honor and the jury what a released order is and what an unreleased order is?

A Well, a released order has a delivery schedule with a provision that this is the delivery schedule they want you to meet. And an unreleased order might or might

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not have a delivery schedule, but it would indicate no deliveries to be made until there is a further release.

Q Your memorandum says that unreleased units are included in the figures set forth at the bottom of the page.

Now, if you had an order from Motorola which even they had not been released yet, why wouldn't that appear with the customers at the bottom of your memo of May 26?

A Because it would have no proposed delivery schedule.

Q So the only unreleased orders that you included in the memorandum were the ones that there was a delivery schedule for, but the customer had not yet released or authorized you to start making the products for delivery on those dates?

A I would think so, yes, sir.

Q Now, down near the bottom of that page, Packard Instrument, $60,000.

Do you recall whether you had any purchase order of any kind from that customer?

A I don't think so.

Q And, finally, Raytheon, $88,500. Do you recall whether you had any written purchase order of any kind from Raytheon by May 26, 1970?

A We had one prior to that date, I am sure, but

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what it provided for I don't recall. There again we had a prototype situation in which we had built one or a few items and there was a problem with it, with the circuit board upon which the product was constructed, which board was supplied by Raytheon, and as of this time, May 26, anyway, my memo would indicate that we didn't have an order for further deliveries during these months.

Q Had Raytheon been a customer during 1969?

A I am not sure whether we started with them in 1969 or whether that would have been in 1970. I think the way Raytheon came about was that a consulting firm in engineering design, a consulting firm by the name of Marketing Technology, had designed or aided in the design of a memory product for Raytheon, and the original order may have come from Technology Marketing, although ultimately it would have been for the benefit of Raytheon.

Q In any event, by May 26, 1970, was Raytheon satisfied with the performance of ISL?

A I don't know whether they were satisfied or not. I can say we at that point still had not been able to resolve the problems with boards and the product itself and the prototype was not accepted.

xx (Defendant's Exhibit CN marked for identification.)

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MR. MALONEY: I am sorry I don't have an extra copy of this, your Honor.

MR. McCONNELL: May I see it?

Q Mr. Kovar, I show you Defendant's Exhibit CN for identification and I ask you if you can identify that letter?

A This is a letter dated May 11, 1970, from Raytheon, Mr. Parker, to myself.

MR. MALONEY: Would you read that letter.

I offer it in evidence, your Honor.

THE COURT: What is the date again?

THE WITNESS: May 11, 1970.

THE COURT: Any objection?

MR. McCONNELL: I think I better take another look at it.

THE COURT: Go ahead.

MR. McCONNELL: This was not a listed exhibit. I have no objection, with the reservation that we don't admit to the contents.

THE COURT: I will receive it.

(Defendant's Exhibit CN received in evidence.)

MR. MALONEY: Your Honor, may I read portions of the letter to the jury?

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THE COURT: Subject to Mr. McConnell's reading what he wants.

MR. MALONEY: There is a lot of technical stuff in the middle.

THE COURT: Well, we have heard a lot of technical things.

MR. MALONEY: I will read the whole thing.

(Mr. Maloney reads from Defendant's Exhibit CN to the jury.)

BY MR. MALONEY:

Q Does that now refresh your recollection, Mr. Kovar, as to why you had obtained no purchase order from Raytheon in the amount of $8500 by May 26, 1970?

A No, sir, it does not.

MR. MALONEY: Your Honor, using a calculator by one of our accountants --

THE WITNESS: I think, Mr.Maloney, that it should be noted that on your summary document you show no bookings forecast for Raytheon, while the fact of the matter is that the document prepared by Mr. Tucker shows a $300,000 sales potential with a Capture Odds of 10 per cent, with a component of reinstatement requirements "new ISL prototype."

Q Tell me what page that is in Mr. Tucker's CJ.

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A Page 8, sir, and what your correspondence, your one piece of correspondence doesn't show is any reply or any subsequent communication with Raytheon, and that is why I said that that letter did not refresh my memory as to why we did not have a production order at the time of my May 26 memo.

Q Well, perhaps I better read everything that Mr. Tucker says about Raytheon on Defendant's Exhibit CJ. It says, "Raytheon Computer; product is 4K x 18, 3-wire, 20406; ISL sales potential, $300,000; Capture Odds, 10 percent; bookings forecast is blank; Capture Month is blank; monthly rate is blank; $600 unit price; components, reinstatement requires new ISL prototype."

I believe, as I indicated before we began this examination, in column 3 are only the figures taken from Mr. Tucker's bookings forecast, which is, in fact, blank on the exhibit.

Now, going back to IBM -- I skip one item here -- I see a contract for IBM, Canada, $90,000.

Now, is that the contract you testified about on Friday afternoon, Mr. Kovar, the cable harness contract for an IBM plant in Canada for which the customer's requirements have been cancelled?

A I believe so.

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Q Isn't that the one, Defendant's Exhibit CI, your letter to Tucker, with his handwritten comments, where he indicates IBM, $90,000; customer's requirements cancelled?

A I don't have that document in front of me. That is correct.

MR. MALONEY: What we have done, your Honor, and this is subject to correction --

THE COURT: That is like one of those machines that are advertised if you start a new account in a savings bank. They may give you one of these adding machines.

You have made an addition?

MR. MALONEY: Yes,and we tried our best to be accurate. We may have made a mistake. Mr. McConnell can check this and correct it at any time.

Q We have added these orders up, Mr. Kovar, to total $1,044,500.

Now, I believe your testimony on Friday was to the effect that in preparing your budget, Defendant's Exhibit F, which shows a total sales projection of $2,448,000, you took two-thirds of the figures on the 1970 sales forecast, Defendant's Exhibit D? Is that correct?

A Approximately, that is correct.

Q And you did not attempt to do this by adjusting

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particular customers, but merely subtracted one-third from the $3,625,000? Is that correct?

A No, that is not correct.

Q Well, how did you do that?

A The way I got at the 2.4 million was to lop-off a third from 3.6 sales projection. Mr. Hourhihan then took that to work out sales. You will notice he has a figure of $2,448,954. Obvously, he has related the figure to certain volumes of certain products. That is the only way that he could determine material costs and labor costs. And I think I indicated to you the other day I am not sure of his back-up data as to how the proration was done, whether it was done on the basis of specific orders in house and projected on that, or whether it was done on a projection of particular orders. I really don't know. I can't say. But I can tell you this, it is quite obvious from the document that you handed me that in order to determine material costs for a budget he has got to have some products in mind, and in order to come up with a specific figure of $2,448,954 he had to have some volume of particular products involved, but I just don't know what those were, how he computed it.

Q Did you ever see them in writing, Mr. Kovar?

A I am sure I saw the back-up data, but I have not

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the faintest idea what it was all about.

Q With respect to the customers that we put on the board, you didn't have a written purchase order yet?

A We didn't have a written purchase order for delivery of May through December, that is correct.

3-4 Q If we subtract one-third of this number, because you say only two-thirds of the orders were included in your budget, we come up with $696,000, isn't that correct, as of May 26, 1970, that you had not yet obtained written purchase orders for, approximately $696,000 of the $2,448,000 which you projected on your 1970 budget?

A I am afraid I don't follow you, sir. $696,000 equals two-thirds of 1 million 44?

Q Yes, you say you took the sale forecast of 3 million 6 and that you took two-thirds of that to come out with a budget forecast of 2,400,000 of sales -- I don't want the jury to consider the 1 million number, because when you prepared your budget you were only taking two-thirds of the numbers on the sale forecast. So what I have done with respect to the orders, the orders forecast for which you had not yet obtained a written purchase order by May 26, 1970, I am taking only two-thirds of that and asking you whether it is not a fact that with respect to this $696,000 by May 26, 1970, you had not obtained written

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purchase orders which were included in the $2,448,000 projected on your 1970 budget?

A I have no way of knowing.

Q You have no way of knowing?

A Not from that material you put out here, no.

THE COURT: We will take our afternoon recess, ladies and gentlemen.

(Recess.)

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T4

(In open court; jury present.)

THE COURT: You may proceed, Mr. Maloney.

MR. MALONEY: Perhaps we could turn the blackboard around for our next item.

THE COURT: Go ahead.

BY MR. MALONEY:

Q Mr. Kovar, the next thing that I would like to turn my attention to are those customers that did appear in column 2 on your 1969 sales projection, Exhibit D, and compare that with the actual amount of the written purchase order which you received by May 26, 1970, for delivery through December, 1970.

I believe the first one there would be Compact, $250,000. Looking across to the fourth column, I see you have a written order of $93,860 for delivery from May through December, 1970. Is that correct?

A That is correct.

Q The amount of the order which you actually had was $93,000?

A That is not correct. The order we had, apparently, called for deliveries in the monthly period noted of that amount.

Mr. Maloney, you know, I have said that every time in response. This May 26th document was not intended

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to be, it doesn't say it is, nor did it list the orders that we had in the house at any particular time.

What it purported to do and what I think that it did was to set forth the orders that we had for delivery through that particular period of time and that is all it says.

b2

MR. MALONEY: I think we agree with that.

THE COURT: I think I understand the problem. If you ask him, it isn't the orders in house but the orders for delivery for the balance of 1970 were $93,860 and you would probably say that is right?

THE WITNESS: Yes, your Honor.

Q If you had an order for a greater amount, that would be for delivery from January, 1971, forward?

A That is correct. That would be my understanding of the May 26th memo. That is what it tried to set forth.

Q So, the memo would not include the last three months of the measuring year, January, February and March; is that correct?

A That is correct.

Q Taking IBM-New York on the next page, two pages over, $240,000 projected December, 1969, and I see that by May 26, 1970, you had an order for delivery in the eight-month period of only $20,000. Is that correct?

A That is correct.

Q Do you recall why such a small portion of that order had been given or released by May 26, 1970?

A My recollection is that IBM sent down a team of quality control and engineer personnel to help us set up a production line for one or two of their products. They had, I think, fix or seven people and we started up with a line of 12 employees. The mutual intent was that, the reason they were putting all that effort into it, was that this was going to build up into a large continuous production order, but at that point in time we were still in training and pilot production.

Q By May 26th?

A That would be the indication from the May 26th memo; yes, sir.

Q Mr. Kovar, do you have any recollection that by May, 1970, IBM had cancelled its requirements for this order of $240,000?

A That would not be the indication from that memo.

THE COURT: Do you have any recollection of that?

THE WITNESS: No, sir. That had not occurred to my knowledge while I was in control.

Q Do you recall sending a report to Mr. Clarke in April or May indicating that IBM had cancelled an order

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for $25,000 a month?

A I do not recall that at the present time, no. You have, Mr. Maloney, my weekly or monthly reports indicating orders received and orders cancelled. It would be on there.

MR. MALONEY: That is what I am looking for.

xx (Defendant's Exhibit BQ marked for identification.)

Q Mr. Kovar, I show you Defendant's Exhibit BQ for identification and I ask you if you recognize that document.

A Yes, sir. This is a report, dated June 2, 1970, from me to Mr. Clarke and Mr. Crocker.

Q Turning to the second page of your report, the next to the last paragraph states:

"IBM just cancelled a $25,000 per month order. Production cutback was the reason."

I ask you if that refreshes your recollection that that $25,000 per month order is the order for $240,000 which you had projected in December, 1969?

A Yes, sir; that must be it.

Q So that ISL was not going to obtain that order in 1970 to the best of your knowledge in May, 1970?

A No, that is not true. All that was true was that they cancelled that order. We had every reason to believe that we were going to get an additional order from

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them and I think if you will look at Mr. Tucker's forecast he indicated $100,000 for IBM-Kingston for the fall startup.

Q Was that for the same product that the $240,000 order had been for?

A Well, it was a stringing of planes. That is what we were doing for them. They were different sized planes so I would say it is the same thing.

Q But, in any event, by May 26, 1970, you had a written order from IBM of only $20,000 for delivery between May and December; is that correct?

A That is correct.

Q Let's take Magnavox next. On Magnavox in December, 1969, you projected $670,000 and in your May 26th memorandum you have $198,000 for delivery during the eight months?

b3 A Yes, sir.

Q Mr. Kovar, do you recall when you projected $670,000 in December, 1969, was it your expectation that the full $670,000 would be delivered during calendar year 1970?

A Yes, sir.

Q Up to May 26, 1970, had you delivered any part of this production order to Magnavox?

A Not of the production order. There was a prototype.

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Q So, no part of this $670,000 had been delivered by May 26, 1970, is that correct, other than the prototype?

A Other than the prototype, that is correct.

Q Would you explain to his Honor and the jury why you had revised your projection of deliveries for the balance of 1970 down to $198,000 by May 26th?

A Yes. The prototype had been built to customer specifications, which specifications subsequently were changed. I think I indicated to you the other day that it was a military project.

Q Is this the prototype we were talking about on Friday that had originally been ordered back in November, 1968?

A I am afraid that date, neither Friday nor November, 1968, ring any bell with me, Mr. Maloney.

MR. MALONEY: Perhaps I can get out the document that we were using.

THE COURT: He means by Friday, I take it, last Friday.

THE WITNESS: Yes, but I am not sure what I said on last Friday as distinguished from another day, your Honor.

Q I show you Defendant's Exhibit BI for identification and turning to the pages in that document I believe we had a sales forecast and shipments in U.S. dollars,

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November 1, 1968. I believe I referred your attention to Magnavox and the Dyefar prototype, which Mr. McConnell had asked you about on direct examination.

Do you recall giving some testimony about that prototype on last Friday afternoon?

A I recall giving some testimony on it; yes, sir.

Q Do you recall that you testified that at that time you were projecting that it might take 12 months to build a prototype, from November, 1968, to November, 1969?

A Yes, I believe so.

Q By May 26, 1970, had you built a prototype to the satisfaction of Magnavox?

A Yes.

Q Had Magnavox agreed to pay you for that prototype?

A I don't know that I asked for their agreement. They ordered it, they got it and I expected them to pay for it.

As I started to explain to you before when I was interrupted, by the time they received that prototype, the design of the program had changed and it was obvious that that unit was not going to fly. It wasn't going to do what they wanted it to any more.

It was approved, however, as a prototype and

we were then instructed to build another unit to the then final engineering specification and it is my recollection that we then started a program for building five the first time out of which the engineering acceptability would have to be determined, but we were going to build five rather than one because we thought it was more efficient and cheaper in the long run.

The $198,000, which is indicated on the May 26th memo, represents 33 units, which at that time we expected to be able to deliver in the May through December period and I think, if you will check our records, that most of it was in the last several months. I don't recall the exact schedule.

Q Do you have any recollection, Mr. Kovar, that in fact Magnavox refused to pay you for the prototype that you had built?

A No. As a matter of fact, Magnavox did not refuse to pay us while I was there. What they agreed to do was to pay, I think it was, $6,700 for that first unit and Mr. Grey, who was the particular sales rep involved, indicated to us that that payment would take place upon the engineering unit, the second and final prototype unit being submitted to them.

Q In December, 1969, Mr. Kovar, did you have a

written purchase order from Magnavox for a particular number of units?

A I think what I had, Mr. Maloney, was a cablegram indicating the purchase order number and indicating 100 units subject to prototype approval.

Q By May 26, 1970, Mr. Kovar, did you have a written purchase order for any number of units for Magnavox? I ask you to think very carefully before you answer.

A I have attempted to do that in most of my answers, Mr. Maloney, and I will continue it.

I am not sure whether we were still going under the telegram at that point or whether there was a subsequent writing from Mr. Osborne, who was the Magnavox buyer.

Q How many units did this cablegram or this letter cover?

A I think it was 100 units, Mr. Maloney.

Q 100 units?

A Yes, sir.

Q Subject to the prototype?

A That is my recollection; yes, sir.

Q Now, at the time you were terminated on June 9, 1970, what -- withdrawn.

By the time you were terminated on June 9, 1970,

had you built the new five prototypes that Magnavox had requested under the new design?

A It is my recollection that they were in construction. They were not completed.

Q Had they been submitted to Magnavox yet for approval?

THE COURT: If they weren't completed, I don't suppose they have them.

MR. MALONEY: All right, I withdraw the question.

Q Mr. Kovar, in the case of Magnavox, was there anything different in connection with qualifying the prototype than with one of your normal customers that was not dealing with the military?

A Well, there were probably two differences at least. One is that the military specifications are almost always more stringent than commercial specifications and in the case of the Magnavox contract, I believe that there was an outside lab test that was involved, which may have beem strictly environmental testing but may have involved more than that, which, of course, was not normally required in commercial.

We had at least one other military contract to my recollection, but I don't recall that that called for the outside lab so that would be at least two

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distinctions.

Q In connection with the requirement for compliance with military specifications, were you required to develop a detailed quality test specifications manual to present to Magnavox along with the prototype?

A I would think so.

Q Do you recall how far along you were in developing that manual by June 9th, the date on which you were terminated?

A No. I, of course, wouldn't have anything to do with its writing or development. I don't know how far along it was.

Q Who would have been responsible for developing and preparing that manual?

A Mr. Keppel was responsible for the program.

Q He was the design engineer, as I understand?

A He is an applications engineer who was the one who primarily designed this particular product, yes.

Q Do you recall the engineers who were concerned with running the quality tests on the prototype and developing the manual?

A Other than Mr. Keppel, I would think both Mr. Boyce and Mr. Ballentine would have been involved.

Q Do you recall any discussions with Mr. Ballantyne

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or Mr. Boyce prior to June 9, 1970, concerning when they thought they would be able to have a prototype ready which would meet Magnavox quality standards?

A My recollection is that we had periodic meetings on that project setting forth a calendar of what had to be done and when it was to be done and by whom it was to be done and I am sure that all three of those gentlemen would have participated in it in reporting to me what the status was. I don't recall any specific dates, however.

Q You have no recollection of the earliest date on which they said they could have that manual ready, for example?

A No, I would think it would show, if it were a weekly meeting, I am pretty sure that Keppel or somebody kept a record of progress and what was behind and what, if anything, was ahead of schedule.

Q So, am I correct, that even this reduced figure of $198,000 on your May 26th memorandum was subject to Keppel and Boyce and Ballantyne being able to build those five prototypes to Magnavox's satisfaction and also having prepared and completed the manual required by the military specifications?

A That is accurate; yes.

Q As you sit here today, you have no recollection

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of when it was projected that those things would be done?

A It was projected that we would be able to produce 33 units by the end of calendar 1970. That is all I can tell from these documents and the records that I have.

Q Would you base that projection on discussions with Boyce and Ballantyne?

A In part, I certainly would think so; yes, sir.

Q Have you made any attempt prior to this action to refresh your recollection concerning the Magnavox contract by discussing with Mr. Boyce or Mr. Ballantyne?

A No, I have not.

Q Do you know where Mr. Boyce is?

A I am advised that he is on the west coast. I don't know that for a fact.

Q Haven't you talked with Mr. Boyce in connection with this lawsuit over the last year and a half?

A No, sir; I have not.

Q When is the last time that you recall talking with Mr. Boyce?

A I don't recall.

Q If I understand your testimony correctly, you do not recall whether there was a written purchase order for the 100 units from Magnavox; is that correct?

A My recollection is that initially all we had

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was either a cablegram -- probably a cablegram to have it in Barbados -- which made reference to, which gave us the purchase order number, but it wasn't the purchase order document.

Mr. Osborne, the buyer, was in Barbados at one point and I was in Fort Wayne on several occasions and I don't think there was any doubt in his or my mind on the basis of those meetings but that we had an order for a hundred units subject to the approvals of the prototypes and, in fact, if we were able to produce in reasonable quantities, the statement of Mr. Osborne was that he would quadruple the order to a 400-piece order.

As you recall from one of the documents we discussed the other day, there were two programs. This particular unit was the larger unit of the two. The other one was the same thing only, I think, half the size. We had discussed ultimately getting into the second program, but that was strictly at a discussion level and nothing had been consummated on that.

One other thing you might want to know is that prior to February 4th Plessey asked for and received a copy of that cablegram from Magnavox.

xx (Defendant's Exhibit CO marked for identification.)

Q Mr. Kovar, I show you --

MR. McCONNELL: May I see it?

(Defendant's Exhibit CO handed to Mr. McConnell.)

Q Mr. Kovar, I show you Defendant's Exhibit CO for identification and ask you if you can identify that document.

A No, I can't. I don't believe I have seen it before.

Q Does that document refresh your recollection that in fact you had no purchase order for 100 units from Magnavox as of May 26, 1970?

A Mr. Maloney, I have never seen that document before and it certainly does not refresh my memory that I had no purchase order.

Q Did this cablegram or this cable or this letter from Mr. Osborne to which you referred set forth a delivery schedule for the Magnavox units?

A I don't recall the words of it. I doubt seriously that it would have had a schedule as such. The understanding was as soon as possible.

xx (Defendant's Exhibit CP marked for identification.)

Q Mr. Kovar, I show you Defendant's Exhibit CP--

MR. McCONNELL: Mr. Maloney, could I see it, please?

(Defendant's Exhibit CP handed to Mr. McConnell.)

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MR. McCONNELL: I am not trying to be difficult, your Honor. These happen to be documents I haven't seen, I mean they are not listed documents.

Q I show you Defendant's Exhibit CP for identification, Mr. Kovar, and I ask you if you can identify that document.

A Yes, this is a copy of a telex, I think, or a cable that probably came over our telex.

Q Is that the telex or the cable from Mr. Osborne to which you have referred in your testimony here today?

A No.

Q Is that telex addressed to you, Mr. Kovar?

A Yes, it is. This telex would have to do with the five units that I said we were building for the -- on the actual final draft of the engineering specs, the designs, and, as you recall, I indicated that we were going to put five together at the same time, one of which would have to go through all of this specialtesting and this, I think, was a specific reference so that we would have something in our files indicating the PO number for these five units.

MR. MALONEY: I offer it in evidence, your Honor.

MR. McCONNELL: No objection.

THE COURT: All right, it will be received.

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(Defendant's Exhibit CP received in evidence.)

Q It is your best recollection that there was an additional telex or cable from Mr. Osborne referring to the 100-unit production order?

A I am sure that there was and I am sure that your people had it prior to February 4, 1970.

(Defendant's Exhibit CQ marked for identification.)

Q Mr. Kovar, I show you Defendant's Exhibit CQ for identification and ask if you can identify that document.

A This is a --

THE COURT: You can identify it, can you?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: It is a cablegram or again a telex from Dale Osborne at Magnavox to myself, dated in 1968, and had to do, I believe, with our order of materials that Magnavox would supply and we asked for materials for more of the units. It, incidentally, referred to a purchase order number and said, "Stop any effort against that order number for the balance of 99 units. Our original telegram stated that ISL must qualify first unit before release could be made for balance."

So, obviously, there is an earlier one, the original telegram that I was referring to that had the

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purchase order.

MR. MALONEY: I offer it in evidence, your Honor.

MR. McCONNELL: No objection.

THE COURT: It will be received.

xx (Defendant's Exhibit CQ received in evidence.)

Q The next customer I would like to take, Mr. Kovar, is Micro-Systems. I believe the December, 1969, projection was $117,000 and as of May, 1970, you had a purchase order for delivery during the eight-month period of $369. Could you explain what had happened

b5 with respect to that order, Mr. Kovar?

A Well, the $369 represented, I think, a few--there were two sizes involved. I think we had already made one size, which would have been the larger one, I guess, and this was a small order for the smaller one, probably four units, and we had not received a production order, at least for delivery through those months, and I don't recall having received a production order at that point.

Q So by May 26th you had not received any production order for delivery in the last eight months of 1970 with respect to this $117,000 projected order?

A Yes, sir.

Q The next customer I would like to take is Nuclear

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Chicago. The December projection, $100,000, and by May 26th you had a purchase order for deliveries for the eight-month period of $19,200.

A Yes, sir.

Q Do you recall whether you had a purchase order from Nuclear Chicago for deliveries beyond December, 1970?

A I don't think so. We were the sole source for them at that time and I don't think we had any additional order over the 19.2 at that point.

Q Do you have any recollection of why by May they had given you a written order for only, for delivery during the eight-month period, for only 20 per cent of the projection?

A I would have to look to see what we delivered them in the first four months to more accurately respond to you, but my recollection is that as sole source we were awaiting additional orders from them and we had been shipping them in the past.

Q As of May 26th you hadn't obtained any such additional orders for delivery in 1970?

A My May 26th memo would so indicate; that is correct.

Q Next I would like to take on the last page Standard Memories. I see a projected order of $180,000,

but in your May 26th memo for delivery in 1970 only $16,527. Do you recall what the problem was then, Mr. Kovar?

A Yes. We had a rather serious problem with them. Standard Memories had started out supplying all material to us and then subsequently they asked if we could supply cores because it was apparent that we had a better core price than they did and so we agreed thatwe would supply--

THE COURT: Where would you get cores?

THE WITNESS: We would buy cores from core manufacturers in the United States.

THE COURT: You could get a better price than Nuclear Chicago could get?

THE WITNESS: This was Standard Memories.

THE COURT: I mean Standard Memories.

THE WITNESS: Yes, because we had a larger volume.

THE COURT: I see.

THE WITNESS: And the arrangement that I made with Mr. Weber, who was the vice president of Standard Memories at the time, was that we would buy cores for his product and we would bill him at the time we bought the cores at our cost and a difference of opinion grew subsequently when Mr. Weber did not want to pay for the cores when we purchased them, did not want to pay for them

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until we delivered product and, two, did not want to pay for cores in sufficient quantity to produce his product.

What was involved there was a difference of opinion as to scrap or waste factor and my recollection is that Mr. Weber said that only a 1 per cent waste factor should be allowed and we were talking either 7 per cent or 11 per cent. The result of which was that a conflict arose between us and orders that had originally been forecast did not go through. Some were cancelled; some were held back in production and the relationship was a stormy one for a number of months.

Q When you say held back in production, you mean you had a purchase order for them, but they were unreleased?

A We had a purchase order from them, but I said we weren't going to ship them. We weren't going to make any more until we resolved our problems.

Q You refused to make any more product until you worked out the disagreement?

A At one point in the relationship. Now, I am not sure of the dates of these, but this was prior to this period of time of May.

Q Do you recall whether that dispute with Standard Memories had been resolved by the time you were terminated on June 11th?

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A I don't believe it had. I say there was a dispute and it doesn't mean we were fighting. We were arguing points of view. Mr. Weber indicated at one point that his parent company would be interested in talking to us about acquisition and I prepared certain information for Mr. Weber having to do with our operation.

Normally it would not be a very good thing to give to a customer who then beat you on the head on price thereafter, but Mr. Weber turned around and used that information to open up his own operation in Barbados.

Q He became a competitor of ISL's in Barbados?

A Well, I don't know that I could say a competitor. What he did was open up his own manufacturing assembly operations for his own use, for his own company's use, so to the extent that they were building for themselves, they were a competitor inasmuch as we had built for them in the past, but they were not to my recollection going out and competing against us with others. They did steal some of our good people so there was competition in that fashion.

T5

Q And to the extent that they started to manufacture these products for themselves it would be correct that they would have less need to order the same amount of products from you?

A I think that would follow, yes.

Q Now, in fact, with respect to some of the customers, you obtained purchase orders in excess of what you had projected in December, 1969, Mr. Kovar, and I will want to be fair, I want to show the ones where you got a purchase order for more than you projected.

A Thank you.

Q And that would be Hewlett-Packard --

This is a little complicated. I am giving you credit for this increase, because, as I said before, in making our computations as to whether you had obtained the orders projected, since the budget forecast only took two-thirds of the sales projection, if you look at the first column on Hewlett-Packard, you had projected orders of $540,000 in December, 1969? Is that correct?

A Yes, that is correct.

Q So if we took two-thirds of that, and going across to the third column, you would actually obtain orders for shipment during the eight months of $498,193, so, in fact, you had obtained written purchase orders in excess of what

mmp2

you may have expected in December, 1969? Is that correct?

A That is what I was afraid you were going to do - your applying ratios and fractions on a basis that makes no sense to me, Mr. Maloney.

I explained before that the 1970 sales forecast was on the basis of the representatives' figures in our December meeting, and I think I indicated to you I tried to make clear that this kind of sales forecast was based upon the assumption that we were going to be able to operate on a full-time basis for the year 1970.

Just as the budget of 1970 was put together on the basis that we would have all the materials we needed and in January we would be able to be producing pursuant to the orders that we had.

Now, as you will know, those facts did not occur, and we really knew in December that they were not going to occur, but we had to have some sort of forecast as to what was available, what was possibly with the operation we had, and one of the assumptions that had to be made, well, if you had everything going, this would be a reasonable forecast of what you could do, and this is what the salesmen said would be a reasonable forecast of what they thought they could get for delivery in this year.

So you are taking these assumptions and these

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assumed figures, and now you are saying, "Well, now, let's apply it to an actual ratio of something that happened five months later," and I think you got an apple and an orange that I can't put together in any meaningful fashion.

Q Let's go on to Honeywell. Now, Honeywell is a little difficult, because, well, if we leave out Mr. Tucker's projection where he broke Honeywell down to five forecasts in 1969, you forecast sales of $75,000 for Honeywell, and by May 26, 1970, you had actually obtained written orders for delivery in the eight months remaining in 1970 of $185,230.

Is that correct?

A That is correct.

MR. MALONEY: If I can just confer with my statistician to see how this all comes out.

THE COURT: Let us know.

JUROR NO. 3: Am I correct in understanding there were no orders after May 26 for the remainder of the year scheduled for delivery?

MR. MALONEY: I am sorry. I think I know what you mean, but would you ask your question again before I answer it?

JUROR NO. 3: Am I correct in assuming that there were no orders received after May 26?

MR. MALONEY: No, I believe there will be testimony in addition to the orders that we have projected on these documents and shown on Mr. Kovar's memo of May 26, additional orders did come in. The dispute will be between the parties whether or not we obtained all of those additional orders that we could have or whether we through one form of fault or another failed to obtain all the orders available.

What we are trying to establish through these numbers are the orders that Mr. Kovar actually obtained himself by May 26, 1970, before he was terminated by Plessey.

THE COURT: Has he finished with his figures?

MR.MALONEY: The problem with this one, your Honor, it gets complicated when you just add this up and take two-thirds of it and take this total, or whether you take the two-thirds first, and we want to be completely fair.

THE COURT: Have you any idea of what would be fairest from your point of view?

THE WITNESS: Neither one would make any sense. You can use either way.

Q Well, the way in which we have done it is we have taken, again to be fair, two-thirds, only two-thirds

of each of these orders, and taking two-thirds of them we get a total of $1,447,998. That is two-thirds of these projected orders.

What we have done is, we have added up the orders which Mr. Kovar actually had on the books according to his May 26 memo for delivery from May through December, and we come up with a difference of $614,260, the difference between two-thirds of what he projected and what heactually obtained by May 26, 1970.

2 THE WITNESS: Mr. Maloney, the figure on the right represents orders on the books as of that date for delivery in an eight-month period. The figure on the left represents a sales forecast for a 12-month period which you say has been inflated, and so you say you are fair and reduce it by two-thirds, so you have two-thirds of an annual sales forecast with eight months of orders for delivery in an eight-month period, and now you not only have an apple and an orange, now in my opinion you got an animal and a mineral.

Q We have to do this step by step. Now, I think that we have our sales for January, February, March and April, and what May actually was, but I don't think we should count May twice.

If we took your sales for the first four months

of 1970 with all the reservations about the problems you were having those months and add them to the figures that we have arrived at here today, it is my belief that that gives us a fair --

THE COURT: Your belief doesn't count. Anyway, that is what you put on?

MR. MALONEY: Yes.

THE COURT: You can argue that. He says you are mixing apples and oranges and maybe vegetables and minerals and animals.

You have made your study. All right.

Q Now, turning to your memorandum of May 26, 1970, it says:

"A review of our current orders including unreleased units shows the following dollar shipments through the end of this year (these figures include the catch-up of the present arrearage)."

THE COURT: What are you reading from?

MR. MALONEY: Defendant's Exhibit AH, Mr. Kovar's May 26 memorandum.

Q (Continuing) And then it sets forth the eight months, May through December, with your estimated deliveries for those eight months, and then it goes on:

"It is quite apparent that we have no laurels

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to sit back on. With a sales forecast of $2-1/2-3 million between April 1, 1970, and March 31, 1971, above figures reveal an average monthly shortage of $33,000 to $75,000, or a total of $269,000 to $591,000 over the eight-month period.

"We should now be getting releases for August and thereafter.

"For your information, the total shipments for this eight-month period totals $1,330,307. That rate, expanded to a 12-month period, amounts to $1,995,460.

"For your further information, the eight-month total is comprised of the following:"

And then it lists the customers and the amounts which we have included in column 4 on Defendant's Exhibit CK.

Now, Mr. Kovar, could you tell me the basis upon which you carry the total figure of $1,330,000 for eight months out to a figure of $1,995,000 for 12 months?

A I would assume what I tried to do is say two-thirds of the year equals $1,330,000 and three-thirds of the year equals $1,995,000, and if my mathematics is correct, it sould come out on that basis.

Q So that estimation was not based on any additional actual written purchase orders which you had? Is that correct?

A That would be correct.

Q That was simply a matter of arithmetic, by dividing $1,330,000 in half, and getting six hunded and some-odd thousand, adding the two numbers together, and coming up with $1,995,000?

A Yes, sir.

Q So that as of May 26, 1970, for the 12-month period, you yourself were projecting sales of less than $2,000,000, unless additional written orders were obtained? Is that correct?

A That is not correct. What I was saying was that for the eight months if you mathematically projected that to 12, it would come out less than 2 million, so start moving. I didn't tell them what I had on order after December 31. My point here was to get them moving, because we didn't have any laurels to sit back on.

Q The total figure of 1,330,000 included released orders and unreleased orders as well? Is that correct?

A Well, it indicates, it includes unreleased quantities, and as I indicated to you earlier, I assumed what that was referring to was where schedules called for deliveries in this eight-month period, but either had a hold or were not released for production as of May 26.

Q And it was at the customer's option as to

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whether or not to release that order?

A That is a legal question. It would require as to the particular order whether they had an option or not or whether there were penalties. One thing we know, one thing we talked about, it showed $198,000 for Magnavox. Now,that was at $6000 apiece, and that is 33 units. It was my understanding with Magnavox that we had a contract, an order for at least a hundred units, and it was also my understanding that that was for delivery as soon as possible, which would depend upon our own capabilities, engineering and production.

Q So as of May 26, 1970, of the total $1,300,000, that entire $198,000 from Magnavox had not yet been released?

A No, what I told you before, Magnavox said as soon as possible, and if we were filling on the basis of the calendar that we had, we would be able to produce and deliver 33 units in the year 1970.

Now, if everything else had fallen through, and we had nothing else to do and I could put four hundred people on Magnavox, theoretically, anyway, it would be possible to deliver the entire $670,000. It is not a practical matter, but theoretical.

Q That $198,000 was contingent on the prototype

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and manual which we discussed before?

A Yes.

THE COURT: We will adjourn now for the day and resume again at 10 o'clock tomorrow morning.

Thank you very much, ladies and gentlemen. I hope you have a nice evening.

(Adjourned to March 14, 1974, at 10.00 a.m.)

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SCIENTIFIC HOLDING COMPANY, LTD.
vs. 72 Civ. 4040
PLESSEY INCORPORATED.

New York, March 14, 1974:
10.00 A.M.

Trial resumed.

(In open court; jury present.)

E. A L L A N K O V A R, resumed.

THE COURT: Good morning, ladies and gentlemen. Nice to see you this morning.

All right, you may proceed, Mr. Maloney.

CROSS EXAMINATION CONTINUED

BY MR. MALONEY:

Q Mr. Kovar, I would like to give you back the exhibits we were discussing yesterday. Before we continue, I would like to make a correction to the figures we put on the blackboard yesterday with respect to this difference of $614,000.

In reviewing the figures overnight, we discovered that we were not getting Mr. Kovar any credit for the $198,000 on the Magnavox in showing the difference between this group of customers, so we have rechecked the figures and taking two-thirds of these customers, we come

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up with the number of 1,468,000, again using the two-thirds figure, not the full amount that was shown on the sales forecast, but taking two-thirds for budget purposes.

Adding the amounts of the orders, as shown on Mr. Kovar's memorandum of May 26, Defendant's Exhibit AH, we arrived at a total of 1,031,500, so that there would be a difference between two-thirds of the orders projected and the orders actually obtained by May 26, 1969, of $436,500.

A Mr. Maloney, excuse me, before you erase that, I am not sure that I understood the 1,468,000 that you have there. What is that supposed to represent?

Q That represents the difference. We took the customers on your May 26 memorandum, taking two-thirds of the amount that you included on your 1970 sales forecast, and comparing those with the actual orders indicated on your May 26 memorandum.

Now, in some cases the amount of the actual order was lower than the two-thirds figure. In two instances, I believe it was Honeywell and Hewlett-Packard, we indicated that you had written orders for more than the two-thirds figure that we are using, so taking the minuses and the pluses, the total difference that we came out with was $436,500.

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Mr. Kovar, while I am erasing, do you have any idea what percentage of the $1,330,000 of orders on the May 26 memorandum were actually released by the beginning of June?

A No, I am afraid I couldn't guess at that.

THE COURT: You don't recall and you haven't any figures from which you could answer that?

THE WITNESS: I don't recall.

THE COURT: All right.

Q Taking the two groups of customers that we compared yesterday, I believe we showed, again using the two-thirds figure with which you don't completely agree, that group 1, which were the customers where you had projected orders but had not received any written order by May 26, as shown on your memorandum, two-thirds of the projection was $696,000 and you had no orders for those.

Taking the second group of customers, we used the figure of two-thirds of 1,468,000 and we show that you have orders on your May 26 memo adding up to 1,031,500.

Now, adding those two groups together, and again only using the two-thirds figure, not the total projection back in December, 1969, we have a projection of 2,164,000 and actual orders received by May 31 of just this number, the 1,031,500.

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So, with respect to those two groups of customers, using the two-thirds of the figure projected in December, 1969, We have a total projection of 2,164,000, but by May 26 we have actual orders of only 1,031,500. Is that correct, Mr. Kovar?

A No, sir.

Q Why is it incorrect?

A Well, in the first place, the 2 million 1 is not a projection of anything. It is the addition of two figures which arithmetically adds up to the sum that you have shown, but to my knowledge that is not a projection of anything.

The 1 million 31, I don't understand. Again, maybe you could explain to me what that is supposed to be. Is that actual orders on books?

Q We took two groups of customers and I believe before we started all of this I said I left out the smaller customers because I don't think it distorts the figures against one side or the other.

A It is the 1,031,000 figure I don't understand, Mr. Maloney.

Q 1,031,000 is the portion of the 1,300,000 on your May 26 memorandum which is represented by those customers that we have discussed in groups 1 and 2.

A I see.

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Q So, out of the total orders which you claimed to have of 1,330,000 on May 26, 1,031,000 of that is represented by the customers that you had projected receiving orders, using only two-thirds, of 2,164,000 during 1970?

A As I say, it is not a projection. You don't add figures together and then call them a projection, Mr. Maloney. I think you are misconstruing what the term is supposed to signify.

If you had looked at our records, which I am sure you have, you would have seen that in February, which was the first time we put together a sales report for 1970, we recorded some $2,000,000 in back orders.

In May, the last reportin May showed back orders of 2.5 million and we showed shipments of somewhere around 400,000, 450,000, and those reports would indicate to you that we had received new orders in the first five months of 1970 of approximately 900,000, so that we had received orders for a little more than twice as much as we had shipped, so our back order status was increasing from the first of the year of 1970 through the first five months of 1970.

Now, those are the approximate figures which indicated what was happening with orders rather than your arithmetical computations here, which are based upon two

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different types of figures in my opinion, Mr. Maloney.

Q What are back orders?

A What are back orders?

Q Yes.

A They are orders that have been received that haven't been delivered. They constituteyour backlog or back order situation.

Q Would they be included in your memorandum of May 26, 1970?

A In part, yes, sir.

Q Which part would be included?

A Well, 1 million 3 of it would have been included for delivery between May and December of 1970.

Q You say that you had computed that the back orders were really $2,000,000 altogether?

A In February when I sent the first report in for the year 1970 and 2.4 million or 2.5 million in May.

Q What part of these back orders would not be included in your May 26, 1970, memorandum?

A The portion which showed no release or requested delivery during May through December of 1970, I would assume.

THE COURT: Can you give us the exhibit number you are reading from for the record?

MR. MALONEY: All, your Honor.

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Q So, to the extent that you had any additional orders that are not reflected on Exhibit AH, they would call for delivery after January 1, 1971; is that correct?

A Yes, that would be my assumption or would not have specified an earlier delivery date in any event.

Q Let me pursue that a little further, Mr. Kovar. In February you said you hadabout $2,000,000 in back orders?

A Yes, sir.

Q How much of the $2,000,000 would have been shipped by April 30th or was shipped?

A By April 30th I think we had shipped maybe 300-plus thousand.

Q What we have done and rather than go through each of the exhibits, we have taken the new sales figure off each of the monthly reports for January, February, March and April and without counting credits or returns, we come up with a number of $311,000. Let's subtract 300,000 from that. So, as of May the 2 million in back orders, I take it, would be down to 1,700,000?

A Yes, that would work out.

Q From that we have to take the 1,330,000 that you have in your memorandum, Exhibit AH; is that correct?

A Yes.

Q So that would leave, as of May, $370,000 of

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existing orders that did not call for shipment until after January 1, 1971?

A Well, that would have been true if our sales group hadn't been doing anything in February, March, April and May, but the fact is, of course, they had, and I thought I had indicated to you that we had been averaging about $180,000 in new orders in the first five months of the year, which was unfortunately but nevertheless the fact that was exceeding our shipments, which is why our backlog was increasing.

Q You weren't averaging orders of $180,000 per month for delivery after January 1, 1971, were you, Mr. Kovar?

A I don't think I said that, Mr. Maloney. I said that we had received approximately $900,000 in new orders in the first five months of the year, divided by five that averages out to $180,000 in new orders per month.

Now, obviously, some months got a great deal more than other months. It is strictly an average.

Now, some of those new orders called for delivery prior to January 1 of 1971. Some of them did not.

All I am saying is that your figure there, as has been the case in my opinion from the start is incomplete.

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Q I have tried to give you an opportunity to correct it in any way you would like.

A I hope I have done so.

Q I think it is important that we make some attempt to determine just how many of the orders on AII were released, what percentage was released. I think we agreed yesterday that Magnavox of $198,000 could not be delivered until a prototype had been built to the satisfaction of Magnavox and a manual in accordance with military specifications had been prepared; is that correct?

A Yes, I guess you could say so, a production prototype would have to be approved, yes.

Q I notice another large order on the May 26 memorandum, Exhibit AII, Compat, $93,860. Do you recall how much of that order was released as of the time you were terminated on June 11?

A My recollection is that the order was substantially greater than the 93,000 figure that shows there, so the ninety-three would --

Q We are not talking about the size of the order. We are talking about how much was released to Compat by the time you were terminated on June 11th.

A That is what I am trying to get at. The ninety-three, apparently, would be for delivery --

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Q In the eight months?

A Some time during the eight months, yes.

(Defendant's Exhibit CR marked for identification.)

Q Mr. Kovar, I show you Defendant's Exhibit CR for identification and I ask you if you can identify that document?

A This is a March 10, 1970, purchase order from Compat to International Scientific.

Q Do you recall receiving that purchase order from Compat some time in March, 1970?

A Yes, it would have been received some time around that date.

MR. MALONEY: I offer it in evidence, your Honor.

MR. McCONNELL: No objection, your Honor.

THECOURT: All right, it will be received.

(Defendant's Exhibit CR received in evidence.)

Q Under this purchase order, Defendant's Exhibit CR, how many units had Compat released for production to ISL by that date?

A On the date of March 3 they had released 46 for delivery.

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Q What was the unit price?

A $494 each.

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Q Now, was that the price that you would charge Compat if they bought only 46 units?

A No, that is the thousand unit price.

Q So they would get that lower price only if they actually only purchased the thousand units? Is that correct?

A Yes. As the document indicates, the price above 46 units is reflected as part of a future quantity order of 1,000 units based on releases within an 18-month period, quantities to be released against our production schedule needs or as required.

Q If they only bought the 46 units what would the price be?

A The price would go up to $565 each.

Q According to my calculation, if they purchased only the 46 units at the higher price of $565, that would mean that as of March they had released an order for only $25,990? Is that correct, Mr. Kovar?

A If that is the multiplication.

Q Subject to the arithmetic being correct.

Now, by May 26th when you prepared Defendant's Exhibit AH do you have any recollection of receiving any further releases from Compat over and above the 46 units reflected on Defendant's Exhibit CR?

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A I don't know. CR calls for deliveries. The last delivery is by 5/10, May 10th. Whether we would have received something additional as of May 26th, I think if we had received something we would put it on the May 26th memo. Whether it had been another purchase order specifically or what, I can't tell you.

Q Under the purchase order is it correct that it called for delivery of 19 units in April and the remaining 27 units in May? Is that correct?

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A That is correct.

Q Do you recall whether or not by the time you had terminated on June 11th those 46 units had been delivered to Compat?

A I thought that they were. I don't recall specifically the numbers, but I thought that they were all delivered.

Q Now, by my calculation unless there were further releases by May 26th when you prepared your memorandum, AH, the difference between the $25,000 figure for which you did have a release and the $93,000 figure would be $67,870. Do you recall whether or not any difficulties in building and delivering the 46 units to Compat took place?

A It would be highly unlikely if there weren't,

Mr. Maloney. I would assume that there were problems.

(Defendant's Exhibit CS marked for identification.)

Q Mr. Kovar, I show you Defendant's Exhibit CS for identification and I ask you if you can identify that document.

A It is an acknowledgment form from Compat dated June 8, 1970, International Scientific, indicating a change order to hold all deliveries until new schedule supply and a new finger sketch is to apply.

Q And what is that change order from Compat dated?

A I thought I mentioned, I think it was June 8, 1970. I assume they are using the United States system still for the United States company.

Q Do you recall whether or not you saw that purchase order before your termination on June 11th?

A No, I could not have seen it.

Q You could not have seen it?

A No way. I was not in Barbados.

MR. MALONEY: I offer it in evidence.

MR. McCONNELL: No objection.

(Defendant's Exhibit CS received in evidence.)

Q Mr. Kovar, to the best of your recollection there were no additional releases beyond the 24 units

between March and June, and in June, according to this purchase order, Compat had decided that it didn't need any further deliveries until it had prepared a new delivery schedule?

A I don't think that was my testimony. I indicated I didn't know and do not now know whether there were any additional releases as of May 26th when I prepared the AH document, and you have shown me a change order dated June 8th, which I have indicated I had not seen prior to my termination, which calls for a hold on the 24 pieces and refers to a new design for the contacts on the board, the printed circuit board that is involved in the particular product, the 46 pieces.

Q Let's go on to just one final customer on your May 26th memorandum, Hewlett Packard. On your exhibit, your memorandum, you show a figure of $498,000. I ask you if you recall how much of that order had been released by the time you were terminated on June 11th?

A No, sir.

(Defendant's Exhibit CT marked for identification.)

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Q Mr. Kovar, I show you what has been marked Defendant's Exhibit CT for identification and I ask you if you can identify that document.

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A This is a four-page shop program form which is dated June 9, 1970, and shows a production report for the week of June 5th and the shop program for the week of June 12, 1970.

Q Were these types of reports prepared in the regular course of business each week to show what had happened in the prior week and what was planned for the coming weeks?

A Yes, sir.

Q Do you recall whether or not you saw this particular shop program?

A I would think not, sir.

Q Do you know who was responsible for preparing these reports?

A This one would have been Peter Hewitt.

Q But you don't recall whether Mr. Hewitt showed this to you prior to your termination on June 11th?

A Well, it is dated June 9th, Mr. Maloney, and I left for the States on June 5th or earlier.

MR. MALONEY: I offer it in evidence, your Honor.

MR. McCONNELL: No objection.

THE COURT: These dates are the English form?

THE WITNESS: That is right.

THE COURT: I just wanted to make that clear.

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THE WITNESS: Yes, when it shows 12.6, that would mean June 12th.

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(Defendant's Exhibit CT received in evidence.)

MR. MALONEY: I don't intend to spend too much time on this. I just want to show the amount of releases to Hewlett Packard. It might be convenient if I pass copies to the jury.

(Defendant's Exhibit CT given to the jury.)

Q Looking at Defendant's Exhibit CT, Mr. Kovar, the first column I assume is the part number which ISL assigned to a particular project? Is that correct?

A Yes, sir.

Q Then under customer, that is self-explanatory, just the name of the customer involved?

A That is correct.

Q Now, purchase order number would be the number of the purchase order which the customer puts on his purchase order and sends to you? Is that correct?

A Yes, sir.

Q Now, the next major heading is previous week. Could you explain to the jury what the three or four columns under that heading previous week refer to?

A Yes, I think so. The first column is TGT, which is target, and that is what the production manager has

targeted for that particular part to be produced in the previous week.

The next column COMP indicates the number of parts actually completed in the previous week.

The third column is SHPT, and that is for shipment, and indicates the number of parts actually shipped the previous week.

And the fourth column held for shipment, I think is self-explanatory.

Q That would be a completed unit that the customer had not yet asked for, so you were holding it to ship it?

A Not necessarily. There would be a number of different reasons why it would be held.

Q Now, the next column says current week. Could youexplain the subheadings under that heading current week?

A The first one, MINTGT, I would think would stand for the minimum target.

Q Apparently that number was not used. I don't see any entries in it.

A I really don't recall. If we had a target all the way through, that would have been the target number that would have been put in there.

Q What is the next column?

A The next one is OPNG arrears, and that is openings

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arrears, so that at the commencement or beginning of the current week how many units were we behind in the schedule delivery for that customer.

Q Stopping for just one moment, Compat happens to be the first customer. I see the number 28 under arrears in that column. Does that refresh your recollection that by the time you terminated, out of the 46 units that Compat had ordered by June 5th, 28 of those units were in arrears and behind delivery schedule?

A That is what this form would indicate.

Q Assuming the form is correct?

A Yes, sir.

Q How about the next two columns, current week?

A The next one is work in PROG, indicating how many units are somewhere along the production line, and the final column is again TGT, target, which is the production manager's goal for the current week.

THE COURT: That would indicate to a layman like myself that there were 13 in progress and the target was to complete eight of them.

THE WITNESS: That is correct.

THE COURT: What does it mean after that, forward load next 12 weeks, where the target for that week was eight, there were arrears of 28, and work in progress 13,

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and then you end up at the end of the forward load, the column says 28 are outstanding, which is the same thing as opening arrears, what does that mean?

THE WITNESS: Well, in this particular case it is left blank because the production manager apparently didn't feel he had sufficient information at this time to estimate the weeks that he was going to be able to get those pieces out. Under other circumstances he might indicate what he thought was going to be the production of that unit in the coming three months or 12 weeks.

Q So even though he had a target of eight, work in progress on 13, he didn't feel he was in position to estimate when those remaining units would be completed?

A Yes, sir.

Q Then we have the next major heading forward load next 12 weeks. Could you explain that to the jury?

A Yes, that is what I was just trying to explain to his Honor.

THE COURT: That is what I was asking him about when you were making your computation.

MR. MALONEY: I will withdraw the question. I apologize.

Q Taking the last column total outstanding on order book, could you explain what the numbers in this

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column represent?

A That would indicate the total number of units on the order book for production.

Q Would that include all released orders, including arrears?

A I'm not sure, Mr. Maloney, whether it merely referred to the three months, the next 12 weeks that he was looking to, or whether it would have been the total.

THE COURT: Total outstanding on order book? The order book wouldn't be broken down into periods that way.

THE WITNESS: Actually, I don't believe we had an order book as such. This is a term. The order might very well show particular release dates. Whether the reference in this form is to the shop order book in terms of what they are planning in the next three months or whether that is intended to be a summary of the total number of pieces on order, regardless of date of time when required, I am really not sure.

b4

THE COURT: Just following through on that to the next page, I notice something called Collins here, total outstanding order of 10, and then February 2nd and March 10th.

THE WITNESS: That was in the prior time. Actually,

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the delivery had been called for earlier. I think that is what those dates are referring to.

Q Let's stay with the example his Honor picked. If the dates February 2nd and March 10th refer to February 2nd and March 10, 1970, why wouldn't those ten items appear in the column opening arrears?

A Because we were waiting for Collins to supply a circuit board. Collins ordered X number of pieces. It said it wanted delivery at a certain time, but it was going to supply the basic part upon which the memory was to be constructed. My recollection is that part was very, very slow in forthcoming from them and we were never able to produce until we got the part, of course.

THE COURT: On that second page under Micro-Systems where the order book number says 4 and there is a problem 65 unreleased, would that indicate that the figures on the order book were released?

THE WITNESS: That certainly would indicate that, yes, sir, at least during this period of time.

THE COURT: So that would be an indication that these figures on the order book were released items?

THE WITNESS: During this period of time if four would have been called for release, 65 were remaining. It may be, your Honor, that that was all that was released.

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I can't tell, and I don't personally recall.

Q Well, turning to Hewlett Packard, again on the second line of page 1, you see various figures which you have explained. At the end of the column it says 217. Now, we had those figures added up and they come to 202. It seems somebody made a mathematical error.

A Is that your writing below the 202 or is that mine?

Q I think that is Mr. Gretten's. But it depends. If someone made a mistake in one of the other numbers, but the total released is 217, it could be there is an error in one of the earlier columns. So we make no representation as to which number is correct. We can't tell.

With respect to Hewlett Packard do you recall whether or not you had orders for two different types of units?

A I think so. I think it was a matter of different size cores.

Q Do you recall that one order was for a 30 mill stack, as they called it, because the cores used in that stack were the 30 mill size?

A Yes.

Q Was there a second unit that they were about to switch over to using a 22 mill size core?

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A I think that is right.

Q Now, could you tell from looking at this document, the second line, purchase order 22-0891, with the 217 total outstanding on the order book, do you recall whether that was 30 mill or 22 mill stack?

A No, I am not sure which one it was.

Q Do you recall what the price of the 30 mill stack was?

A No, sir.

Q Does the number $1190 refresh your recollection?

A I was just looking at the 1970 sales forecast and it had 450 units at $1,200, so that is probably the one we are referring to.

Q Well, take $1,200 to round it off and giving credit for the higher number, the 217, my statistician will add that up.

THE COURT: You are asking him to multiply?

MR. MALONEY: Yes.

Q (Continuing) That would be $260,000 released on the 30 mill stack.

Do you recall the price of the 22 mill stack?

A No, I do not.

Q I think we turn over to the third page, down near the bottom, the fourth line up from the bottom, we have

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Hewlett Packard with a different purchase order, 22-02644--

JUROR NO. 4: On the next page?

THE COURT: The third page, sheet number 3, fourth from the bottom.

Q (Continuing) -- and that says total outstanding on order book 36 units. Does that refresh your recollection, Mr. Kovar, that as of the beginning of June Hewlett Packard had released only 36 of the 22 mill stack?

A No. It does not because it seems to me that there was more.

Q Do you recall the price of that stock?

A I don't recall it.

Q Does $733 refresh your recollection?

A I was just looking at Mr. Tucker's bookings forecast, your GJ document, and that indicates a unit price of $700. It was around there some place, $700.

Q Well, take $700. I can't put my hands on it right now, $700 times 36. That would be $285,000 released, assuming that the figures on this exhibit are correct, Mr. Kovar.

A Okay.

Q That would leave unreleased $213,000?

A If that is the difference.

Q Yes, that is the difference if all these

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documents are correct. So that if all the calculations which we have made are correct, and just taking these three larger orders, out of the total of $1,330,000 on your May 26th memorandum, Defendant's Exhibit AH, $478,000 of that would still be unreleased by the customers as of the beginning of June, 1970? Is that correct?

A That is what those figures would indicate if that is what this form indicates, yes, sir.

b5 Q Subtracting that figure from the $1,330,000 and assuming that all the calculations we have made are correct, you would have only $862,000 of orders actually released for delivery in the eight-month period, May through December, 1970? Is that correct?

A Yes.

THE COURT: Have you checked that? Is that right? That should be a 5.

Q The corrected figure should be $852,000?

A Yes.

Q Now, I believe you testified yesterday that when you prepared your memorandum of May 26, 1970, Exhibit AH, the way you got that the rate expanded to a 12-month period amounts to $1,995,460, I believe that you explained that figure by saying you divided the eight-month figure of one million three in half and just added

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that half to come up with the one million nine? Is that correct?

A I think that is the way you explained it. It came to the same thing. What I said was that 19 is expanded 12 months at the same rate as the 13 represents for the eight months.

Q I guess I misunderstood. How do you get from $1,330,000 for eight months up to $1,995 on the 12-month rate?

A I divide one million three by eight to give me a monthly figure, and then multiply that by 12 to give me an annual figure.

Q Isn't that the same thing, Mr. Kovar?

A It might very well be. You asked me what I told you, and I am trying to explain it again.

Q I want to be sure we have it right so we go to the next step. If we divide this figure by eight, we would get a monthly rate of $107,000 roughly.

A Have Mr. Gretten check it. I am not sure. Okay, 107 is a little high.

Q Well, I am giving you the benefit, I think, of $4,000.

A It is not for my benefit.

Q If we multiply that by 12 we will get a 12-month

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rate of $1,278,000?

A No, you would get a sum total of a figure of $1,278. I don't know what that would represent.

THE COURT: That is the projection if you are taking the eight months.

Q What I have attempted to do is to take just the released orders on your memorandum and carry that out to a 12-month rate, as you did when you included the released and unreleased. I hope I have done it correctly, and I will give you any opportunity to show me what I have done differently. Just taking the actual released orders where the customer said you could deliver.

So, on that basis, it would be $1,278,000 for 12 months, rather than $1,995,000, as indicated in your memorandum when you included released and unreleased.

A That is the way the computation comes out, yes, sir.

MR. MALONEY: Would this be a good time to take a recess?

THE COURT: Yes.

(Recess.)

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T3 (In open court; jury present.)

THE COURT: All right, Mr. Maloney.

BY MR. MALONEY:

Q Mr. Kovar, I show you Plaintiff's Exhibit 14 in evidence, which you have previously identified as your report to your board of directors concerning the March results. If I understood your testimony correctly concerning that exhibit, it shows a net profit or loss of $35,000 on the first page, which you testified would be the loss on the Plessey accounting basis, but in your explanation to the board on the second page you say that based on ISL's accounting basis, the loss would have only been $18,800; is that correct?

A Yes, sir.

Q The paragraph reads:

"In addition, there were approximately ..."

I should start on the prior page.

It says: "It should be noted that under our prior reporting system, repairs were not included in the sales figure. Thus, we would previously have shown sales of $80,488.

"In addition, there were approximately $8000 in expenses which are not attributable to ISL. Under the prior system and not counting Plessey

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expenses we would have shown approximate gross sales of 80,000, cost of sales 70,100, manufacturing profit of zero, total G.A. marketing, engineering and interest of 18,800 and, therefore, a net loss of $18,800 for the month of March."

Now, in the reports prepared in January, February, April and May results, in arriving at profit or loss, did you count returns or not count returns?

A I think, as I indicated here, the March results were set up in the form that Plessey's bookkeeping called for and that showed a net loss of 35,000.

Then, I indicated in my note to our remaining directors that under our prior method, I thought we would come to an 18.8, excluding the specific costs which were attributable only to Plessey and, therefore, not counted against the earnings.

What I had done was to ask Ed Hourihan of the expenses, the 26,700 expenses, how many should not be counted under the earn-out, and he said approximately 8000.

Q So the only part of the difference between the 35,385 and the 18,800 that would be attributable to Plessey and not chargeable to you under the contract is the $8000 expense; is that correct?

A As far as the expense is concerned, that is correct.

Q What would the loss have been excluding the 8000 in expenses, but including goods returned and repaired goods reshipped to the customer?

A According to this, it would have been 35,000.

Q Less the $8000 in expenses?

A Well, you are going to have to start over with me again then.

THE COURT: What he is trying to get you to say is that if you had taken the 8000, which you say was attributable to Plessey, and you credited yourself with that, that would reduce the loss from 35,000, I suppose, to 27,000?

THE WITNESS: If you subtract 8 from 35, it would indeed be 27, your Honor.

THE COURT: I think that is what he is trying to get at. Would that be right?

THE WITNESS: Yes, sir.

THE COURT: That was on your figures, assuming you are right, that the 8000 should have been attributed to Plessey, that would have reduced the loss to about $27,000?

THE WITNESS: That is what it would reduce it

to; yes, sir.

Q The $27,000 figure would give effect to the returned goods and repaired goods that were reshipped as was done inpreparing the reports for January, February, April and May; is that correct?

A They were included in the computation; that is correct.

MR. MALONEY: Thank you.

Q Mr. Kovar, I believe you testified on your direct testimony that you had gone to Chicago some time in early June and that there was a meeting with Mr. Carlen on or about June 9; is that correct?

A That is right.

Q That was prior to anyone's receiving a copy of Mr. Sinsheimer's letter, dated June 9, is that correct?

A Yes, sir.

Q Do you recall whether Mr. Lewis was present at your meeting with Mr. Carlen?

A Yes, as I indicated earlier, I wasn't sure whether it was Harold or whether it was Julius and I think it was Julius Lewis.

Q I show you Plaintiff's Exhibit 17, which I think you previously identified as your report, dated May 13, 1970, to your board of directors, is that correct?

A Yes, sir.

Q That is the report on which you added the hand-written notations indicating that Mr. Clarke and Mr. Crocker had made certain demands on you earlier in May?

A That is correct.

Q That referred to giving Mr. Parr complete pricing authority, marketing authority and changing the work bench layout, is that correct?

A That is what it is referring to, yes.

Q Were those topics discussed at the meeting with Mr. Carlen and Mr. Lewis on June 9?

A Indeed, they were.

Q Was your refusal to go along with those changes the basis on which you thought that Mr. Sinsheimer might terminate you when you met with him later in the week?

A Yes, sir.

Q Was there any discussion of any other basis upon which Mr. Sinsheimer might terminate you at that meeting?

A Yes, sir.

Q What else was discussed at the meeting?

A The request or instruction that Mr. Keppel report to Mr. McNamara and that, therefore, our engineering department --

Q Leaving aside the Clarke and Crocker demands, all of those things you have testified to, I am sure all of those were discussed, but other than those things that the company was asking you to do, was there any other discussion at that meeting on June 9 about Mr. Sinsheimer taking over based on some provision in the contract?

A Well, there was a question as to what provision of the contract could he do so, yes.

Q Under what provision of the contract could he do so?

A None at that point.

Q Which provision of the contract did you discuss at the meeting?

A Well, we were talking about the takeover provision, which as I recall it Section 5-D.

Q Paragraph 5-D?

A Surely.

Q Now, as of June 9, did you and Mr. Carlen and Mr. Lewis understand that you had May and June to average in order to reach the $15,000 profit level?

A That was my understanding certainly.

Q Had anyone from Plessey said to you by June 9 that your understanding was incorrect and that you had to make the $15,000 profit in the month of May?

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A No, sir.

Q So that at this meeting with you and Carlen and Lewis on June 9, no one could have anticipated the fact that Mr.Sinsheimer's letter of June 9 would base his assumption of management control on the failure of the company to achieve profits of $15,000 in the month of May, is that correct?

A That is not correct. You asked me what provision of the contract did we discuss when we were talking about a possible takeover. There was only one section to my knowledge and that would have been Section 5-D.

The question came up how could they possibly claim the right to take over under 5-D and we looked at 5-D and I explained that the contract language ss of February 18 was not the governing language, that we had amended it on March 2 and that is when Carlen blew up because that is when it came to his knowledge.

The point of our discussion really was that regardless of March 2 or February 18, they still didn't have a right under our contract to take over in May and the question was, what do you think you are going to do in June, and I was estimating on the basis of what our shipment figures were as to what we were going to do in June.

Now, the discussion at that point, of course, had to be based upon guesses as to what Plessey might do, not knowing.

Q Then, it is your best recollection that as of that meeting on June 9 there was a discussion Mr. Carlen's presence that even if the March 2nd amendment was valid, Plessey could not take over control merely because you did not make $15,000 profit in May; is that correct?

A That is correct.

Q Do you agree with Mr. Lewis, then, that Mr. Carlen's recollection of the June 9 meeting is incorrect?

MR. McCONNELL: I object to that, your Honor. Mr. Carlen explained his testimony on redirect.

THE COURT: I will sustain the objection.

Q If I understood your testimony correctly on your direct testimony that at the conclusion of the meeting on June 9, Mr. Carlen instructed you not to express any reaction on behalf of the company to whatever Mr. Sinsheimer told you when you met him later in the week, is that correct?

A I don't think I indicated it was an instruction from Mr. Carlen. We had a group discussion of principal people involved and it was concluded that I should go to New York to the meeting on the 11th as requested and then

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find out what the official position of Plessey was going to be and for me not to take any official position but to report back.

Now, it wasn't an instruction from Mr. Carlen. This was our consensus, this was the decision of the group.

Q Mr. Kovar, I show you Plaintiff's Exhibit 26, which is Mr. Sinsheimer's letter, dated June 9, and I believe you testified on direct that Mr. Sinsheimer was not present at the meeting, but Mr. Albert and Mr. Clarke delivered that letter to you; is that correct?

A That is correct.

Q What did you understand Mr. Sinsheimer to be saying in that letter with respect to the basis on which he was assuming management control?

A I understood him to say that the contract required us to not average less than 15,000 a month commencing May 1; that he had been advised by our comptroller that we didn't make 15,000 or to quote, "did not reach 15,000 in the month," consequently he was exercising his alleged right to assume complete management control. That is what I understood him to be saying in the letter.

Q Did you say to either Mr. Albert or Mr. Clarke that Mr. Sinsheimer did not have any right to take over as of that time because you should have been given until June

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to average 15,000 profit?

A No, what I said was, what does this mean as far as I am concerned?

Q Then, there was the discussion concerning the termination of your personal services with Clarke and Albert to which you testified on direct?

A Yes, sir.

Q But you recall no discussion with them as to whether or not the takeover was one month early based on your understanding of paragraph 5-D?

A To my knowledge there was no such discussion.

Q Mr. Kovar, I understand that the plaintiff claims in this action that Plessey not only breached the contract, but it defrauded ISL. Now, what is your understanding of the basis on which the plaintiff has made its claim that Plessey defrauded it?

A My understanding is that Plessey never intended to operate ISL as a business enterprise; that it never intended to allow the management of ISL to generate profits during the measuring year to the maximum; that it never intended to honor the right of ISL management to stay in control during the measuring year; that its real intention was to absorb ISL into its preconceived memory plans, which called only for an assembly shop somewhere outside of

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the United States to support a U.S. engineering and sales operation in memory product.

Q You mean when the contract was signed on February 4, 1970, Plessey did not intend to live up to the management provision in paragraph 5-D?

A That is my belief; yes, sir.

Q It is your belief that when that provision was amended on March 2nd, Plessey did not intend to live up to even the terms of that modified management provision; is that correct?

A That is correct. It learned in the meantime that we had not only a good opportunity, but a probability of making the earnings called for in the February 4 agreement, and, therefore, had to reduce the period in order to continue the conspiracy to take us over. That is my opinion.

Q When for the first time did you form that opinion?

A I don't know the date. It would have been some time prior to the commencement of this suit.

Q Well, when Mr. Sinsheimer sent his letter to you of June 9, assuming management control, did it occur to you at that time that Mr. Sinsheimer had defrauded you?

A I am really not sure of whether the thought occurred to me. I certainly was not very happy and I think, as I indicated, I recommended that we commence litigation

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at that point, but I am not really sure that I considered them to be at that point dishonest and had attempted to defraud us.

Q What is the basis upon which you now believe that Plessey did not intend to live up to the contract when it signed the contract?

A Because I have now seen the plans that Plessey had prior to any discussion with us; the plans as they developed during the discussion of acquisition with us; the plans for dismissal of Kovar prior to any discussion of same; the world plan, which they subsequently attempted to implement through me and when I refused to go along with that threw me out and then proceeded to throw out everybody else in the organization who had any knowledge of what was going on.

Now, it wasn't until that entire picture came before me that I finally reached the conclusion that I have. I think you will note, Mr. Maloney, that at one point I even offered to go to work for Plessey because at that point I thought in all honesty they were just fouled up and didn't know what they were doing and I thought I could help.

Q Do you recall when that was?

A No, you have the copy of the letter. I am not

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sure whether it was August or September.

MR. MALONEY: Let me mark it for identification.

(Defendant's Exhibit AP marked for identification.)

Q I show you Defendant's Exhibit AP for identification and ask you if you can identify that letter?

A Yes, sir; the letter I just referred to is dated August 6, 1970, from myself to Mr. Sinsheimer.

Q By that letter were you requesting that Mr. Sinsheimer employ you to work for Plessey, Inc.?

A That is correct.

Q By August 6, 1970, you understood that Mr. Sinsheimer had assumed management control of ISL in violation of what you understood the agreement to be; is that correct?

A That was my feeling, yes.

MR. MALONEY: I have no further questions, your Honor.

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REDIRECT EXAMINATION

BY MR. McCONNELL:

Q Mr. Kovar, would you state again precisely what it was that Mr. Clarke was asking you to agree to back in May?

A Yes,sir. First,he wanted total control of marketing, including the pricing of our product, and specifically he was asking that those authorities and those powers be transferred to Mr. Parr. newly hired by him, who was to report directly to Mr. Clarke and that I would be out of the line of authority of determining marketing practices and, more importantly, to determine price of product.

Secondly, he wanted the ISL engineering function to be transferred to the United States and the control of the engineering functions to be transferred to Mr. McNamara, who would report to Mr. Clarke.

So that at that point both marketing and engineering would be transferred from my control and authority ultimately to Mr. Clarke.

He wanted the U.S. operation to be established in the Boston area and he wanted the production facilities in Barbados to be converted over to not only resemble but to be exactly like the Malta and Lisbon facilities were, as he explained them to me or described them to me.

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In short, it seemed to me he wanted to make Barbados-ISL into an assembly shop, period.

Q What, again, was the date of these conversations?

A They initially took place during the spring joint conference in Atlantic City and that would have been May 7, 8, 9, around there, maybe 10th.

Q And the final confrontation in Barbados was when?

A This, I believe, was May 9th. We left the Atlantic City conference and flew down to Barbados and the final confrontation took place the following morning in my office in Barbados.

Q I show you what has been marked Plaintiff's Exhibit 72 and ask you if you can identify that?

A That is a multi-page document entitled "Integrated World Memory Business Plan," dated May 8, 1970, and sets forth, as the title indicates, a worldwide memory business plan of the Plessey components group.

MR. McCONNELL: I offer it in evidence, your Honor.

MR. MALONEY: I have no objection to the plan, your Honor, but I would object to any lengthy testimony about it since I don't think it relates to anything I

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raised on cross-examination.

THE COURT: I will receive the exhibit.

MR. MALONEY: We have no objection to the exhibit.

MR. McCONNELL: I believe you asked Mr. Kovar what he based his claim of fraud on and this goes right to it.

MR. MALONEY: Oh, all right.

Q The date of that report again is when?

A May 8, 1970.

4 xx (Plaintiff's Exhibit 72 received in evidence.)

Q Who is shown on the distribution?

A Amongst others, it shows Mr. Sinsheimer, Mr. Don Clarke and Mr. F.J. Parr, who was the marketing man who was introduced to me at the Atlantic City meeting.

Q For the first time?

A For the first time.

Q Are you on that distribution list?

A No, sir; I am not.

Q Would you turn to page 1 thereof and the paragraph headed "Summary" and read the first two sentences, please?

A It says: "This brochure sets out a plan to

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develop our existing substantial U.K. memory business and our newly formed U.S.A. memory business into a world-wide total memory activity. The basis of this plan is the development of an organization integrated under one management."

Q Would you turn to page 5 and the section headed "U.S.A." and read that portion of the document to the Court and the jury, please?

A It says: "The recent establishment of the U.S.A. memory division forms the basis of the plans for the U.S.A. With the recent acquisition of ISL in Barbados advancing these plans considerably. The decision has already been taken to establish a marketing, engineering and service facility in the Boston area and before very long a marketing and engineering facility will also be established on the West Coast. A new marketing manager for the U.S.A. has recently been appointed and the Barbados management strengthened by the loan of the manager from the Portugese facility."

Q Those were the very things that Mr. Clarke was asking you to assent to, is that right, in these May conversations?

A That is correct.

Q When you indicated that you couldn't go along

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with that because you thought it would depress profit short term and you had an obligation to your shareholders to maximize profits --

THE COURT: Wait, please don't make a summation. Is that supposed to be a question?

MR. McCONNELL: I withdraw it, your Honor.

THE COURT: All right.

Q When you indicated that you did not assent to what Clarke was asking, Mr. Crocker pulled you aside and said that Clarke was getting mad, is that right?

A That is correct.

Q And, of course, at the time he was asking your assent, these very things had already been actioned, hadn't they?

A I now know that to be the fact.

THE COURT: Wait a minute. This is a very nice conversation, but I think we had better get the questions and answers.

MR. MALONEY: Your Honor, I would move to strike the last answer because this is merely a statement of what is planned to be done. As far as I know, there has been no testimony that a Boston facility had been established as of May, 1970.

THE COURT: Don't you get into a long conver-

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sation. I won't strike it, but I would like questions and answers and not a combined solilquy or whatever it is called that two persons have.

MR. McCONNELL: All right, your Honor.

Q Would you turn to the organization charts, which appear at the rear of that document. They don't have page numbers.

A Yes, sir.

Q There is a page headed "Year 1 70/71." Do you find that?

A Yes, sir.

MR. MALONEY: I haven't found it yet. Just a moment, please.

THE COURT: It is at the end?

MR. MALONEY: It is how many pages from the end, three?

THE COURT: Four.

MR. MALONEY: All right.

Q What is the organizational structure shown for the U.S. market?

A It shows a marketing manager, noting East Coast operation, Boston, covering technical and service.

It shows a general manager, Barbados operation, covering manufacturing and technical, both of whom report

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to a world planning manager.

MR. MALONEY: Your Honor, I don't know whether this is the appropriate time, but the chart shows a lot more than that, I believe.

THE COURT: You will get your chance on that.

Q It was left, wasn't it, that Mr. Clarke was going to check back with Mr. Sinsheimer?

A That is correct.

Q And then, as I recall your testimony, following these May discussions you attempted to get in contact with Mr. Sinsheimer several times?

A I initially attempted to get hold of Mr. Clarke.

Q Were you able to?

A I contacted him on several occasions and asked him what was occurring and he said he still didn't have a definitive answer from Mr. Sinsheimer. The matter was still being reviewed.

Q Do you recall the date of your last conversation with Mr. Clarke before you went to New York and you were told that you were through?

A It would have been either June 8th or June 9th when he advised me that Mr. Sinsheimer wanted to meet with me on June 11th in New York.

Q Do you recall when prior to that you may have

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talked with him?

A No, I don't recall the date.

Q Now, going to your termination and the agreement to pay you six months' compensation --

THE COURT: Didn't we go through all this before? I don't remember anything in the cross that came up about this. Did anything on cross come up?

MR. MALONEY: No, your Honor.

MR. McCONNELL: He examined him on the document, I believe.

THE COURT: I don't remember anything coming up. I don't want to get repeating.

MR. MALONEY: Yes, your Honor, I did ask him what benefits Plessey conferred on him under the settlement agreement.

MR. McCONNELL: I just want to get the other half of that coin.

THE COURT: All right, get the other half of the coin, then.

Q Those benefits, what were you asked to give up or agree to?

A I was asked to agree to a non-competition provision, which indicated over a certain period of time I would agree not to go into a competing business with Plessey,

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and I was asked to waive any and all claims against Plessey for any form of claim that I might have against them.

Q Was there some modification in that last request?

A Yes, sir. The ultimate agreement was that I was waiving all claims except those as a shareholder and invester in International National Scientific, Ltd.

THE COURT: I wonder whether the ladies and the gentlemen of the jury holding those exhibits, whether they need to hold them any more?

MR. MALONEY: No, your Honor.

THE COURT: Collect them. I think they might be a little more comfortable.

MR. MALONEY: I am sorry, your Honor.

Q Going to the subject of what orders youhad on the books, did I understand you to testify that as of February, 1970, you had back orders of $2,000,000?

A Yes, sir; slightly over.

Q And that as of May, 1970, you had back orders of 2.5 million?

A Approximately; that is correct.

Q Did you further testify that in the period January through May you had shipments of approximately $450,000?

A That was my recollection, yes, sir.

Q So that the increase in the back orders from

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2 million to 2.5 million, then, was accounted for by new orders taken of approximately 900,000?

A That would be the primary difference; yes, sir.

Q This was at, I believe you said, an average rate of $180,000 a month?

A That is correct, but it wasn't 180,000 per month. That was just the average.

MR. McCONNELL: I understand.

Mr. Maloney asked some questions on Plaintiff's Exhibit 24 and I now offer it in evidence, your Honor. It is the June 2, 1970, letter from Mr. Kovar to Mr. Clarke.

THE COURT: Show it to him.

MR. McCONNELL: I think he gave it a defendant's number.

MR. MALONEY: We have no objection to the piece of paper, but, of course, we do not admit the accuracy.

THE COURT: Exhibit 24 will be received.

(Plaintiff's Exhibit 24 received in evidence.)

Q The closing was on March 2, 1970. How soon thereafter did you get the working capital that Plessey agreed to supply, the money?

A The money was almost immediately forthcoming.

THE COURT: That was the 600,000 or the 800,000?

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THE WITNESS: Yes, actually what was done is that a line of credit, I think, was set up for us, and we then started paying our creditors and suppliers.

THE COURT: A line of credit up to $800,000?

THE WITNESS: I think it was more than that, because it included the down payment money that had been given to the shareholders of ISL and also it included, I think, the moneys that had been expended for the house and so I think it was more than even 800,000, your Honor.

Q How long did you estimate that it was going to take you to turn this company around?

A I think the most optimistic estimate was it was going to take two months to make a turn-around and a third month we were aiming, hopefully, for a break-even.

Q At what sales figure would the business break even?

A I think the figure 135,000 was generally conceived to be a break-even figure.

Q Referring to the June 2 report, Plaintiff's Exhibit 24, would you read the first paragraph thereof and then the new shipments figures?

A Yes. It said, "The month of May showed continued improvement. April new shipments exceeded March new shipments by 17 per cent. May exceeded April by 38

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per cent. Net sales showed an increase to 56 per cent April over March and May was 41 per cent over April."

Then, I set forth the figures for the three months of March, April and May.

Q What were those figures?

A I broke it down between new shipments and the net returns, which would be the difference of what we got back from a customer to re-work and what we re-worked and shipped back to the customer.

Q That would either be a plus or a minus net return figure, right?

A Yes, it would minus where we received more back from the customer than we had repaired and returned; it would be a plus when we were returning more than we were getting back in the case of repaired work.

For the month of March I showed 85,500 in new shipments, but a negative net return of 15,847 for net sales in March of $64,653. That compared to April where new shipments had increased to 94,388 and the net returns now were at a plus value of 6713 for a net sales figure of April of $101,101.

In May it showed new shipments of 131,881, a plus figure for net returns of 11,252 with net sales being $143,133 for the month of May.

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Q In excluding the terms, was it your testimony that for the month of March you had a loss of $27,000 on your accounting basis; for the month of April, a loss of $1,800; and for the month of May, a profit of $6200?

A I am sure of the last figure. I am not sure of the other two, but the controller's report that was given to me on June 8th, I believe, showing the results for the month of May, showed a $6200 profit for the month of May.

Q Well, I show you Plaintiff's Exhibits 14 and 17 and ask you if that refreshes your recollection as to the first loss figures I mentioned.

A Yes, on our basis it indicated a loss in the month of March of $18,000 approximately, and $10,000 loss in the month of April, and, as I say, it was a $6200 profit in the month of May.

Q Going back to the Data 100 loan of $200,000 as to which you and Van Bellingham and Johnson pledged your stock as collateral, what happened to that $200,00?

A The $200,000 was intended to be used, of course, to pay suppliers so that we could get the supply material movement going again. Unfortunately, the bank, our bank, the Canadian Imperial Bank, when I deposited the $200,000 said it was taking the full $200,000 to reduce our loan

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from them, and I never got to use any of the $200,000 to reduce our payables to creditors and to get material moving again.

Q Was Plessey aware of that fact?

A Indeed, yes, they were.

Q At the time you commenced your discussions with Plessey, taking the period now, December and January, were you still having discussions with other potential buyers of the company?

A Yes, sir.

Q Was Plessey aware of this fact?

A They were. I had so advised Mr. Sinsheimer.

Q Going to the closing on March 2nd, Mr. Kovar, did Mr. Albert ever say that ISL was in breach of the warranty or representation that losses in the ordinary course would not exceed 20,000 per month for the period January and February?

A No, sir, he did not.

Q Mr. Maloney asked you whether or not after these demands were made for the two changes, the additional money and the cost of that, and shortening the management period, whether you attempted to contact any of the other directors? Do you recall?

A Yes, sir.

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Q Was Van Bellingham's stock also pledged to Data 100?

A It was.

Q Was Johnson's stock also pledged?

A It was.

Q You said in answer to one of Mr. Maloney's questions that you didn't feel you could risk calling Plessey's bluff. What did you mean by that and what would have been the situation?

THE COURT: Didn't we go through that?

MR. McCONNELL: It was raised with Mr. Lewis, your Honor.

THE COURT: I guess so.

A Well, if Plessey were not bluffing and we said no to their demands, it was my feeling that we would have a company without money, and the majority of the stock of which was held by Data 100, namely, all of mine and Vic Johnson's and Van Bellingham. So we had a bankrupt company, a lawsuit, and no money, and not only were our personal investments involved, but those of a number of other people, and I didn't feel we could chance calling the bluff.

Q The February 4th agreement provided that a warranted statement for the 1969 profit and loss and balance

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